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In The

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

WESLEY HARVEY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below precludes the application of ordinary principles of finality in the adjudication of thousands of claims for benefits filed by miners under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 ("BLBA").

The questions presented are whether the scheme to override finality in these cases embraced by the court below or the variations adopted by other circuits at the urging of the United States Department of Labor ("DOL") are prohibited –

(a) by the principles of finality contained in the BLBA and the Longshore and Harborworkers' Compensation Act, 33 U.S.C. §§ 901-952 ("LHWCA");

(b) by section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d); and

(c) by this Court's decisions in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988); *Greenwich Collieries v. Director, OWCP*, 512 U.S. 267 (1994); and *Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 1953 (1997) ("*Rambo II*").

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Lovilia Coal Company is a defunct corporation. The Old Republic Insurance Company is the administrator of federal black lung benefit claims for the Bituminous Casualty Corporation. The Bituminous Casualty Corporation is the insurance carrier for the black lung claim of Wesley Harvey. Both the Bituminous Casualty Corporation and the Old Republic Insurance Company are wholly-owned subsidiaries of the Old Republic International Corporation. Respondent Wesley Harvey is a claimant for benefits under the BLBA. The Director, Office of Workers' Compensation Programs, United States Department of Labor is the administrator of the Black Lung Benefits Program and is a statutory party in black lung claims. 30 U.S.C. § 932(k).

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PETITION FOR WRIT OF CERTIORARI

The Lovilia Coal Company and Old Republic Insurance Company respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 109 F.3d 445. Appendix ("App.") 1. The order of the court of appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc is unreported. App. 95.

The administrative decisions all are unreported. These decisions are: (1) the decision and order of the administrative law judge ("ALJ") denying the original claim, App. 85; (2) the administrative orders denying the original claim following statutory reopening, App. 80; (3) the administrative order denying the second claim, App. 78; (4) the administrative order denying the third claim, App. 75; (5) the administrative order denying the fourth claim, App. 73; (6) the administrative order denying the fifth claim, App. 68; (7) the decision and order of the ALJ modifying the denial of the fifth claim, App. 56; (8) the decision and order of the ALJ denying reconsideration of the decision and order granting modification, App. 54; (9) the decision and order of the Benefits Review Board, U.S. Department of Labor, vacating the ALJ's decision, App. 40; (10) the decision and order of the ALJ awarding the fifth claim on remand, App. 34; and (11) the final order of

the Benefits Review Board, affirming the award of benefits on the fifth claim, App. 26.

JURISDICTION

The judgment of the Eighth Circuit was issued on March 21, 1997, App. 1. A timely petition for rehearing was denied on August 1, 1997, App. 95. On October 27, 1997, Justice Thomas extended the time to petition for a writ of certiorari to and including December 1, 1997 (No. A-303). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following authorities are reported in the Appendix.

1. Section 7(c) of the Administrative Procedure Act. 5 U.S.C. § 556(d), App. 96.

2. Section 19 of the Longshore and Harborworkers Compensation Act. 33 U.S.C. § 919, App. 97.

3. Section 21 of the Longshore and Harborworkers' Compensation Act. 33 U.S.C. § 921, App. 100.

4. Section 22 of the Longshore and Harborworkers Compensation Act. 33 U.S.C. § 922, App. 104.

5. 20 C.F.R. § 725.309 (1997), App. 105.

STATEMENT OF THE CASE

A. Introduction

It is not often that the House of Delegates of the American Bar Association ("ABA") adopts a resolution opposing a federal agency's action because the ABA collectively has determined that the action violates the law.[1] It is not often that a federal agency simply refuses to acquiesce in principles of law that are clearly articulated by this Court in its recent decisions. This petition presents such a case.

Beginning in 1993, the United States Department of Labor ("DOL") reinterpreted a fifteen year old regulation, 20 C.F.R. § 725.309, App. 105, to establish a scheme that essentially eliminates finality in the adjudication of thousands of claims for benefits under the BLBA. Neither the scheme nor the mechanisms that make it work have any statutory foundation or legislative origin. It evolved in agency briefs over the course of claims litigation in the courts of appeals that regularly consider federal black lung cases.

Although there are at least three distinct pathways to avoid finality depending upon the circuit in which the claim arises, the main consequence of this scheme for

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[1] Twelve copies of American Bar Association House of Delegates, Recommendation No. 115 (1997) have been lodged with the Court and served on the parties. The Report submitted to the House of Delegates in support of the recommendation was prepared by the ABA Section of Tort and Insurance Practice and the National Conference of Administrative Law Judges. The Report is for information purposes only and is not itself voted upon by the House of Delegates.

mine operators and their insurance carriers is that reasonable expectations of finality embodied in the relevant statutes and reflected in insuring and self-insuring agreements are unmet.

The court below affirmed an award of benefits to Mr. Wesley Harvey, a six-time claim filer. Four prior final denials are dismissed as unimportant. This result is not in accordance with the BLBA, the LHWCA, or the APA and the scheme for overriding the normal rules of finality plainly is inconsistent with this Court's decisions in *Pittston Coal Group v. Sebben*, 488 U.S. 105, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, and *Rambo II*, 117 S. Ct. 1953.

B. Background

The BLBA is a federal workers' compensation law that provides benefits to coal miners and their families on account of total disability or death due to pneumoconiosis or "black lung" disease. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991). The procedures for the adjudication of black lung claims are set forth in the LHWCA. *Greenwich Collieries*, 512 U.S. at 271; 33 U.S.C. §§ 919-922, *incorporated by reference into* 30 U.S.C. § 932(a). By virtue of this incorporation, the APA also applies in the adjudication of black lung claims. *Id.*

In claims filed on or after July 1, 1973, and certain other claims subject to review by DOL under 30 U.S.C. § 945, benefits are paid by a mine operator, its insurance carrier, or if no responsible operator can be found, an entity called the Black Lung Disability Trust Fund. 30 U.S.C. §§ 932(a), 934.

On two occasions, Congress enacted a legislative reopening of finally denied and closed cases to provide certain groups of unsuccessful claimants another chance at obtaining benefits. 30 U.S.C. §§ 941, 945, *Pittston Coal Group*, 488 U.S. at 108-9. Section 22 of the LHWCA allows an unsuccessful applicant one year from a final denial of benefits to seek a redetermination based either upon a mistake of fact in the earlier adjudication or changed conditions. 33 U.S.C. § 922; *Rambo II*, 117 S. Ct. at 1959 (*citing Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2146-47 (1995)).

No other provision of the BLBA or LHWCA allows for or addresses the reopening of finally denied claims. In *Pittston Coal Group*, this Court held generally that in the absence of a congressional mandate to reopen, ordinary principles of res judicata apply in black lung claims. *Pittston Coal Group*, 488 U.S. at 122-23.

DOL's regulations contain a provision, called "Duplicate Claims," addressing the handling of multiple applications for benefits. When published as a notice of proposed rulemaking, the rule articulated normal principles of res judicata or claim preclusion by providing that a new claim filed after a final prior denial had to be denied on the basis of the prior denial unless the new filing met the criteria for modification under section 22 of the LHWCA. Proposed 20 C.F.R. § 725.309, 43 Fed. Reg. 17,743 (1978). After notice and comment, the final rule was revised to permit a readjudication of a prior final denial if the new filing met the criteria for modification or it is determined "that there has been a material change in conditions." 20 C.F.R. § 725.309(c), (d).

Although adopted in 1978, the rule rarely was cited or used until the 1990s. Through the early 1990s, DOL vacillated among four or five interpretations of the refiling rule before settling on what is called the "one element" test. *See Lovilia*, 109 F.3d at 451, App. 11.

The one element test is unknown in any other area of law and it is not an "ordinary" principle of res judicata. It is an elaborate and confusing subterfuge to escape those ordinary principles.

The "one element" test works this way. The standard DOL denial letter identifies three fact elements that must be satisfied to support an award to a miner. The miner (1) must have pneumoconiosis, (2) the pneumoconiosis must be caused at least in part by coal mine employment, and (3) the disease must cause total disability for work. *See* App. 11-12.[2] When DOL or an ALJ denies a claim, the operative documents specify the factual deficits in the claim (*e.g.*, the miner does not have pneumoconiosis, or the miner's disability was caused by something else). *Id.*[3]

According to DOL, a "material change in condition," within the meaning of section 725.309(d), is established if

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[2] This Court and the court below have described the three elements a little differently than does DOL in its claim documents. This Court held that in order to obtain benefits the miner (1) must be totally disabled, (2) the disability must be caused at least in part by pneumoconiosis, and (3) the disease must arise out of coal mine employment. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 141 (1987). The two groups of elements are not meaningfully different.

[3] The APA requires a precise statement of reasons for a denial or award. 5 U.S.C. § 557(c)(3)(A).

new medical proof developed after the final denial of a prior claim proves any one element that was found lacking in the prior claim. *See* App. 12. For example, if the adjudicator originally found that the miner did not have pneumoconiosis, new independent proof that the miner now has pneumoconiosis establishes a material change in conditions.

After a material change is established, all elements are readjudicated in light of all the evidence in the record, both new and old. App. 12. Any prior determination has no preclusive effect. Accordingly, if a miner had lung disease that was found to have been caused by cigarette smoking but was not totally disabling in a prior final adjudication, under DOL's theory, the miner could, in a duplicate claim, prove that his lung disease has become totally disabling. If total disability is proved, the question of its origin would again be relitigated. There are no words in section 725.309 or in any statute that arguably introduce this unprecedented res judicata analysis.

The one element test has several features that frame the legal objections to it. First, it is predicated upon an irrebuttable presumption that all pneumoconiosis is progressive and latent. *See* App. 9-10 (holding that pneumoconiosis is a progressive disease as a matter of law). This first presumption is not only unlawful under *Greenwich Collieries*, but the "fact" that is presumed (invariable progressivity or latency) is rarely true. There are three types of pneumoconiosis covered by the Act, "complicated" pneumoconiosis, "simple" pneumoconiosis and "legal" pneumoconiosis. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7-8 (1976). Complicated pneumoconiosis is progressive and sometimes latent, but it also is extremely

rare. Simple pneumoconiosis is the most common form of the disease and according to the Surgeon General of the United States, "Simple CWP [coal workers' pneumoconiosis] does not progress in the absence of further exposure." U.S. Dep't. Of Health and Human Services, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace – A Report of the Surgeon General* 294 (1986). "Legal" pneumoconiosis is any other chronic lung disease caused by dust arising out of coal mine employment. 30 U.S.C. § 902(b). No scientific evidence has been identified in these cases to support the theory that "legal" pneumoconiosis is either progressive or latent absent further dust exposure.

In its repudiation of the views of the Surgeon General, the statutory medical advisor to the Black Lung Program, 30 U.S.C. § 902(f)(1)(D), the court below simply nullifies the science as a matter of law on the basis of unlitigated observations made by various courts over the years that pneumoconiosis is a progressive disease. App. 10.

The "one element" test then requires a second burden-shifting presumption that is rebuttable or irrebuttable depending on the circuit in which the case arises. New evidence proving one element presumes the appearance of latent pneumoconiosis or that the miner's pneumoconiosis (whether latent or previously not disabling) has progressed to disability. The court below prohibits any inquiry into whether the new evidence simply relitigates the prior finally denied claim, or whether it reflects health effects unrelated to coal mining, or whether it simply reflects doctor- or ALJ-shopping by a previously unsuccessful claimant. In conducting the material change

analysis prescribed by the court below, the adjudicator is compelled to find a material change simply because the new evidence now establishes one element that previously precluded entitlement.

These two burden-shifting presumptions are the operational units of the one element test. They prohibit any genuine factual inquiry into whether there actually was a change, whether the change is material (i.e., related to mining) or even possible. All of these "facts" are presumed once one element is proved by new evidence. Then the claim is relitigated de novo. The result is that ordinary principles of claim preclusion and finality do not operate in duplicate black lung claims and a claim defendant's reasonable expectation of finality cannot be realized.

C. The Claims of Wesley Harvey

Wesley Harvey filed six claims for black lung benefits. The first was filed in 1973. App. 88. While it was pending, Harvey retired from mining in 1975. On August 26, 1976, an ALJ denied Harvey's first claim because Harvey did not have pneumoconiosis or any respiratory disability. App. 85. This first claim was subject to rereview under 30 U.S.C. § 945(a), when Congress reopened previously denied claims in 1978. *See Pittston Coal Group*, 488 U.S. at 121. In 1980, and again in 1981, DOL denied Harvey's first claim because he met none of the elements of entitlement. App. 80.

Claims two, three and four each were filed more than one year after a previous final denial, in 1983, 1984 and

1987 respectively. App. 73, 75, 78. Each claim was administratively denied because Harvey met none of the elements of entitlement. In no claim did Harvey contend or was there any medical evidence to indicate that Harvey had recently contracted pneumoconiosis or that his health was deteriorating. He just kept trying to get benefits.

Harvey filed a fifth claim in 1990, and DOL denied this claim too because Harvey met none of the elements of entitlement. App. 58. Less than one year after the denial of the fifth claim, U.S. Senator Harken asked DOL to readjudicate Harvey's entitlement. Because the letter was submitted within one year from the last denial, DOL treated it as a request for modification under 33 U.S.C. § 922, but denied the claim again.[4]

An ALJ considered the request for modification of the fifth claim and awarded benefits. The ALJ found a material change in conditions based upon a test that

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[4] Lovilia asked that it be dismissed as a party to Harvey's claim on the grounds that liability for Harvey's original claim transferred to the Black Lung Disability Trust Fund under the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635 (1981). No one ever has disputed the fact that the 1981 law transferred liability for Harvey's first claim; however, in 1994, when DOL formulated its one element test, one feature of the scheme required treating subsequent claims as new causes of action unrelated to the original cause of action. This fiction, in turn, made the statutory transfer language inapplicable to the subsequent claims, even though in principle those subsequent claims fit squarely within the types of claims that were determined by Congress to be inappropriate liabilities for individual mine operators and carriers. Another consequence of DOL's one element theory is, therefore, a loss of statutory rights to liability transfers under the 1981 amendments. *See* App. 4-7.

predated the one element test.[5] The ALJ's analysis of the evidence on the merits after crossing the material change threshold was a shambles and the Benefits Review Board vacated the award. App. 40. On remand, the ALJ reinstated the award and the Board affirmed. App. 26, 34. The ALJ did not find that a material change in conditions occurred in fact. The presumptions made a genuine factual inquiry unnecessary. The ALJ found that Harvey had somehow contracted "legal" pneumoconiosis almost twenty years after leaving coal mine employment.

Lovilia appealed to the Eighth Circuit. Lovilia challenged the denial of a liability transfer under the 1981 amendments and claimed that Harvey's fifth claim was barred by res judicata. The Eighth Circuit had not yet adopted the one element test and Lovilia argued that the test was legally impermissible under *Greenwich Collieries* because of its use of non-statutory burden-shifting presumptions (1) that pneumoconiosis is invariably a progressive and latent disease and (2) that new favorable evidence addressing one element, if credited, proves changed conditions.[6] Lovilia urged the Eighth Circuit to

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[5] The prevailing test at that time was an "any evidence" test, first articulated by the Benefits Review Board. By this test, any new evidence which, if credited, might change the result satisfied the material change standard. This test later was repudiated by all the courts of appeals. *See e.g., Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554 (7th Cir. 1991) (*"McNew"*).

[6] Lovilia's appeal also challenged the award on its merits on the grounds that the ALJ's decision was defective in its failure to even mention much less weigh the evidence unfavorable to the claimant. In this regard, Lovilia alleged a violation of the ALJ's duty of reasoned decisionmaking.

reject the one element test in favor of the Tenth Circuit's interpretation of section 725.309 which requires direct proof of materially changed conditions in order to warrant readjudication, and which employs no impermissible burden-shifting presumptions. *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996).

The Eighth Circuit affirmed the award to Harvey and Lovilia's liability for it. The Eighth Circuit considered whether it would adopt the "one element" standard previously adopted by the Third, Fourth and Sixth Circuits or the direct proof approach of the Seventh and Tenth Circuits which "do not follow [the] one element approach." App. 12.

The court below resolved the conflict by deferring to DOL's interpretation of its own regulation. On that issue, the court ignored Lovilia's argument that in imposing standards of proof for determining a material change, DOL was interpreting the APA and not a law it administered. The court below did not, therefore, address this Court's clear admonition that no deference is due to an agency's interpretation of the APA. *See Rambo II*, 117 S. Ct. at 1963 n.9.

The court below also rejected Lovilia's challenge to the one element test. Responding first to the argument that it is scientifically and factually improper to presume irrebuttably that pneumoconiosis is a progressive disease, the court cited repeated (but unlitigated) observations of several circuits and this Court that pneumoconiosis is progressive. The court rejected Lovilia's argument that these observations are dictum and scientifically incorrect.

The court also ignored Lovilia's argument that a presumption of invariable latency is not supported even by dictum. That matter is relevant in Harvey's case because Harvey was found to be pneumoconiosis-free from 1974 to 1990. When he was found to have "legal" pneumoconiosis in 1991, one would expect proof showing that it is possible to contract legal pneumoconiosis for the first time more than fifteen years after last exposure.

Turning to Lovilia's argument that the one element test creates an impermissible burden shifting presumption of materially changed conditions, the court below held

> There is no dispute that the Director's interpretation creates a presumption – that is, it calls for an "inference of an ultimate fact from a predicate one." *Mullins*, 484 U.S. at 157 n.30. However, the presumption does not violate *Greenwich Collieries*. In fact, in that case, the Court noted that "due to Congress' recognition that [black lung] claims . . . would be difficult to prove, claimants . . . benefit from certain statutory presumptions. . . . The Court indicated that the statutory and regulatory presumptions which ease a claimant's burden of production . . . do not violate the APA. 512 U.S. at 272. . . . In this case the Director's interpretation is akin to the statutory and regulatory presumptions. . . .

App. 14-15. This analysis is incorrect at every turn. No statutory presumption supports the one element test. In fact, no provision of any statute is cited in support of it. The "regulatory" presumptions referred to in *Greenwich*

Collieries simply repeat the statutory presumptions. None reflect evidentiary presumptions created by the agency. Moreover, in a preceding paragraph and then in the next paragraph, the Eighth Circuit notes that the one element test "compels" an inference of changed conditions that cannot be refuted. App. 12, 15. To turn around several lines later and say that the presumption shifts no burdens is inexplicable.

Addressing the irrebuttable component of the one element presumption, the court below observes that "the Director does not dispute that his standard creates a mandatory presumption, that is, it 'compels' rather than permits an inference," but the Court agrees with the Director that this is not an "irrebuttable" presumption.[7] App. 18. The court then observes that even if the presumption is irrebuttable, it is permissible because it serves some proper purpose. App. 19. In light of *Greenwich Collieries*, no authority exists for DOL or the court below to adopt irrebuttable presumptions that foreclose a party's right to litigate relevant facts. The Eighth Circuit's analysis describes what Congress may do, not what agencies or adjudicators may do without express authority.

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[7] The court below agrees with the Director that the one element test does not create an irrebuttable presumption because it allows an employer to dispute the presumed fact. A sentence earlier, however, the court notes that the test creates a mandatory presumption; that is, it "compels rather than permits an inference." App. 18. No attempt is made to identify the fact that is rebuttable because there is none.

REASONS FOR GRANTING THE WRIT

A. The Courts of Appeals Do Not Agree

The landscape in the circuits for overriding finality is messy and confusing. The distinctions among the decisions of the circuits are subtle, but they also are legally and practically of great significance to claim defendants and they offend normal principles of finality to markedly different degrees.

The Sixth Circuit was the first court to adopt a version of the one element standard. *Sharondale Corp. v. Director, OWCP*, 42 F.3d 993 (6th Cir. 1994). At the time, the Sixth Circuit had three choices: the Benefits Review Board's "any new evidence" standard, described by the Seventh Circuit as making "mincemeat of res judicata,"[8] the newly minted one element standard which was being pressed for the first time, and the Seventh Circuit's *McNew* standard. Under *McNew*, there are no implicit presumptions. The claimant seeking to avoid the bar of res judicata must prove with evidence that he experienced a "material" deterioration in his condition as a result of coal dust exposure.

> It is not enough that the new application is supported by new evidence of disease or disability, because such evidence might show merely that the original denial was wrong, and would thereby constitute an impermissible collateral attack on that denial.

McNew, 946 F.2d at 556.

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[8] *McNew*, 946 F.2d at 556. When *McNew* was decided, DOL had not yet arrived at the one element test and had advocated various other interpretations of section 725.309. *Id.* at 558-559.

Moreover, although the "one element" test had not been formulated when the Seventh Circuit decided *McNew*, that test could not have passed muster under the Seventh Circuit's analysis. Addressing the Board's "any new evidence" rule, the Seventh Circuit observed that relying solely on new evidence to get over the material change threshold would violate the one year limitation on modification contained in section 22 of the LHWCA (applied to black lung claims in 20 C.F.R. § 725.310). *Id.* at 557 ("The regulation cannot mean both that you can set aside the denial on the basis of new evidence within one year and that you can set aside the denial on the basis of new evidence at any time.").

Faced with these choices, the Sixth Circuit conducted no analysis of the text or the importance of finality, but simply deferred to DOL as the program administrator. *Sharondale*, 42 F.3d at 998 ("although we are presented with competing judicial and agency interpretations of the material change provision contained in § 725.309(d), our discretion in adopting one construction over the other is not unfettered. This court has previously afforded due deference to the Director's position in cases raising similar questions. . . . ") (footnote omitted). The Sixth Circuit apparently was unaware of the problems presented by the underlying presumptions and APA questions raised by DOL's new formulation. The Sixth Circuit does, however, contemplate a comparison of new and old evidence to determine whether a material change actually occurred as a factual matter at some point. *Sharondale*, 42 F.3d at 999.

The Third Circuit followed with its endorsement of the one element test. In contrast to the Sixth and Seventh Circuits, the Third was asked directly to consider the

scientific and APA flaws in DOL's one element approach. The Third Circuit refused even to acknowledge the APA problems. It simply defaulted to the deference position. *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 317 (3d Cir. 1995). The Third Circuit believed that the DOL approach was more faithful to "the principle that courts should liberally construe remedial legislation." *Id.* at 318. It is not clear whether the Third Circuit adheres to the last paragraph of the Sixth Circuit's decision suggesting a right to litigate the material change issue as a matter of fact.[9]

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[9] A remarkable feature of the Third Circuit's decision is its discussion of the scientific questions of latency and progressivity underlying DOL's one element rule. No scientific evidence was presented at trial on either issue. Judge Posner of the Seventh Circuit attempted to investigate the scientific questions on his own after *McNew* was decided. *Freeman United Coal Mining Co. v. Hilliard*, 65 F.3d 667, 669 (7th Cir. 1995). He found some articles suggesting that some forms of pneumoconiosis were progressive. *Id.* The key articles Judge Posner discovered were not peer reviewed or published in a peer reviewed journal and reflect highly questionable science that differs from the views of the Surgeon General. Some of the material Judge Posner found is generic, addressing dust diseases not found in coal miners but in other worker populations. Relying on Judge Posner's research, the Third Circuit simply dismissed the employer's views on the science as nonsense. This Court is not being asked to intervene in this scientific debate because the APA makes judicial intervention unnecessary, but the perception that all black lung disease is progressive and latent predates the best science and is based largely upon attributing characteristics of other dust diseases to black lung disease because when the perception arose, distinctions among the many forms of pneumoconiosis could not be or were not made. As a matter of science, the views of both the Third and Eighth Circuits do not reflect a consensus among scientists today.

The Fourth Circuit first sided with the Seventh Circuit, but granted rehearing en banc, and then announced its own version of the one element theory. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 763 (1997). The Fourth Circuit split 7-6 on rehearing and the majority adopted the most extreme repudiation of finality up to that time. The majority did not address the APA or the scientific flaws in DOL's one element theory. It rejects the Seventh Circuit's approach and settles instead on the premise that all new claims are new causes of action per se and must, therefore, be litigated from scratch if one element of a claim now can be adjudicated in favor of the claimant. *Id.* 86 F.3d at 1361-62. The majority absolutely foreclosed all possibility of actually litigating whether a material change occurred by rejecting that aspect of the Sixth Circuit's test. *Id.* 86 F.3d at 1362 n.11 ("we do not endorse, however, the closing paragraph of *Sharondale Corp.* . . . ").

Under the Fourth Circuit's approach, finality is merely an inconvenience and it has no meaningful effect on the later filed claim. The dissent in the Fourth Circuit criticized the majority's opinion for abandoning any requirement that a change be "material." *Id.* 86 F.3d 1366.

> That the majority's standard allows recovery of benefits merely upon a showing that the claimant is today eligible for benefits, without any evidence whatever of a change in his condition, is confirmed by the fact that the majority expressly rejects the requirement, from the Sixth Circuit's decision it purports to adopt, that the ALJ make certain that the evidence presented with the duplicate claim "differ[s] qualitatively" from the evidence available at the time of the

> initial denial. . . . The majority, thus, adopts for this circuit the very rule that even the Sixth Circuit recognized was manifestly untenable . . .
>
> When all is said and done, therefore, the majority holds that a claimant is entitled to benefits if he comes forward with any additional evidence of his condition "after" the denial of the original claim and shows that he now is entitled to benefits, . . . whether or not the claimant proves a material change (or a change at all) in his conditions from what they were at the time he was earlier denied benefits . . . Not only is such a holding irreconcilable within the plain language of section 725.309(d), it "makes mincemeat" of the doctrine of res judicata underlying section 725.309(d) by permitting the previous decision to be reevaluated, as the majority itself says, ad infinitum.

Id. 86 F.3d at 1366.

In the Fourth Circuit, a claimant who successfully relitigates one element after a final denial avoids res judicata because a material change of conditions is irrebuttably presumed. Moreover, all the old evidence supporting an award that was rejected the first time may be reevaluated de novo. The Fourth Circuit's decision pays lip service to finality, but does not honor its principle at all.[10]

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[10] This Court denied certiorari in *Lisa Lee*. In opposing certiorari, the Solicitor General pointed out that the Fourth Circuit's discussion technically was dictum. Moreover, the petition in *Lisa Lee* did not correctly identify the APA issues presented and the Fourth Circuit was not presented with the

Next, the Tenth Circuit rejected the Seventh Circuit's opinion and all variations of the Director's one element rule. *Wyoming Fuel Co.*, 90 F.3d at 1509 ("[W]e disagree with these circuits and find the Director's standard to be flawed."). The Tenth Circuit takes the most literal approach to the words of section 725.309:

> Having considered the various standards, it seems that the Director has made this inquiry needlessly complicated and that all of our concerns are best addressed simply by applying traditional notions of res judicata and the plain language of the statute and applicable regulations. Thus, we hold that in order to bring a duplicate claim, a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied.

Wyoming Fuel, 90 F.3d at 1511.

In June 1997, the Seventh Circuit attempted to harmonize its material change standard with the views of the circuits that adopted the one element test. *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997). Earlier, in *Hilliard*, the Seventh Circuit held that new evidence

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key issues in its consideration of the case. The petition for certiorari asked the Court to consider whether section 725.309 was prohibited by the modification provisions of section 22 of the LHWCA (and it clearly is not prohibited by that section) and challenged the validity of the rule generally. Neither issue correctly characterizes the important problems needing resolution. The petition for certiorari in that case and the lower court's decision itself did not present the best opportunity to resolve the conflicts presented.

standing alone, *e.g.*, a new x-ray, could not prove a material change because the positive x-ray might only show a difference of opinion between the new reader and the readers in the original claim. *Hilliard*, 65 F.3d at 669 ("The fact that he has more evidence of disease or disability on the second round does not show that his condition has changed. He may simply have done a better job of gathering evidence the second time around.").

In *Spese*, the en banc court held that it could agree with the one element test so long as the particular element "has now been shown to be different." *Spese*, 117 F.3d at 1009. The Seventh Circuit approved a finding of a material change on the basis of a new positive x-ray and the Department's "acceptance" of progressivity, because the employer had somehow waived objection to the formulation when the case was tried years earlier. *Id.* at 1010.[11] The *Spese* analysis most likely still contemplates a right to litigate whether a material change occurred in fact.

The Eighth Circuit's decision followed. The decision seems to most closely follow the Fourth Circuit's approach in finding that materially changed conditions are automatic or irrebuttably "compelled" on the basis of new evidence meeting the one element test. App. 19.

Accordingly, in the Tenth Circuit, res judicata is waived if direct proof establishes, by a preponderance, that conditions have materially changed. In the Fourth

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[11] Because the one element test was years away from formulation when *Spese* was tried, the relevant issues hardly could have been raised.

and Eighth Circuits, res judicata is waived if the claimant submits new evidence and proves he is entitled to benefits. By proving entitlement, it is irrebuttably presumed that conditions materially changed and no direct proof on the fact may be considered. In the Sixth Circuit and perhaps the Third Circuit,[12] it is irrebuttably presumed that pneumoconiosis is latent and progressive and it is rebuttably presumed that new proof of one element waives res judicata and allows a full readjudication. Direct proof may be considered, but it is the employer's burden to prove that conditions did not change materially. The presumption, as described by the Sixth Circuit, is burden shifting. In the Seventh Circuit, proof of a change in one element may be good enough, but the Seventh Circuit does not eliminate a factual consideration of whether a material change actually occurred and does not shift the burden to the employer.[13] It is fairly likely that direct proof may be considered.

This is not a rational environment, particularly in the complete absence of any indication that Congress intended to permit more than one final adjudication. This environment provides none of the ordinary protection promised by principles of finality and it virtually assures that claimants in the Fourth and Eighth Circuits are going to be better off than claimants elsewhere. This Court has observed that the allocation of the burden of proof on an

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[12] The Third Circuit's alignment on the relevance of direct proof of changed conditions is not clear.

[13] The Seventh Circuit noted that latency and progressivity should be legislative facts, but was unable to make them so. *Spese*, 117 F.3d at 1010.

important fact is "rarely without consequence and frequently may be dispositive." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). At this time, burdens of proof vary considerably. The Court should step in to restore order and uniformity and to enforce compliance with *Pittston Coal Group*, *Greenwich Collieries* and *Rambo II*.

B. The Decision Below is Not Consistent With the Decisions of this Court or the BLBA, LHWCA or APA

In *Pittston Coal Group*, this Court held that ordinary principles of res judicata apply in black lung claims. 488 U.S. at 122. This Court also has held "there is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981). It is extraordinary that in rewriting the black lung program to sanction a lifetime right to file black lung claims, no court that does so cites one provision of one relevant statute as authority for this holding.[14] Each court defers to DOL's interpretation of a regulation that does not contain a single word suggesting the one element test. DOL does not rely upon a single word or provision of any statute to support the test. The agency does not even deny having made it up fifteen years after the regulation was written.

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[14] Generally Congress knows how to leave the door open to overcome the rules of finality. *See Weinberger v. Salfi*, 422 U.S. 749 (1975).

The one element rule does not reflect normal principles of claim preclusion or any ordinary notion of finality in our jurisprudence. If the rule were applied generally, the courts would be filled with disgruntled, unsuccessful personal injury litigants whose health got worse, notwithstanding prior final judgments settling the dispute or finding that the party sued did not harm them. Our courts would be cluttered with refilers.

It is, perhaps, for this reason that the House of Delegates of the ABA thought it important to be heard on the question when DOL published proposed regulations seeking to codify its one element rule. *See* 62 Fed. Reg. 3395-96 (1997). The ABA expressly opposed proposed revisions to section 725.309 because it "revises the extent to which the common law concepts of res judicata, claim preclusion and collateral estoppel, or issue preclusion, apply to the adjudication of black lung claims." ABA House of Delegates Recommendation 115. The Report submitted by the sponsoring entities of the ABA noted that the DOL proposal "creates an impermissible burden shifting presumption of latency and progressivity to justify a waiver of the important principles of finality" and "creates a rebuttable presumption to shift the burden of proof from the claimant to the claim defendant in violation of the APA and the Supreme Court's decision in *Greenwich Collieries*."

In *Greenwich Collieries*, this Court held that section 7(c) of the APA imposed upon the proponent of a fact the burden of proving it by a preponderance of the evidence. No agency is permitted to re-allocate those burdens where the APA applies and no agency is accorded deference for its interpretations of the APA. DOL narrowly

construes these holdings and denies their key principles. DOL refuses to apply *Greenwich Collieries* in the one element test and published in the Federal Register its defense of the burden shifting presumptions needed for the test. 62 Fed. Reg. 3359-60. These are the identical arguments presented to and rejected by this Court in *Greenwich Collieries*, and they are the same arguments presented to and rejected by this Court in *Rambo II*. They are the same arguments presented to and embraced by the Eighth Circuit in this case. DOL's insistence on its authority to override the APA in the face of contrary, clearly articulated precedent is inappropriate and remarkable. It is appropriate and equally remarkable that the governing body of the ABA would initiate an effort to repudiate DOL's non-acquiescence in an important decision of this Court. There is no doubt that the agency simply will not follow the law and for that reason, this Court should step in as well.

In many ways, this case is the black lung program's version of the problem addressed in *Rambo II*. Workers' compensation awards may need to be reopened from time to time. Coal miners may return to work or continue working as their claims are adjudicated. Even if the possibility is remote, some persons with pneumoconiosis could have deteriorating health sufficiently related to black lung disease to warrant another evaluation.

In *Rambo II*, this Court permitted DOL to fashion a reasonable accommodation, but drew a bright line prohibiting the use of burden-shifting or conclusive presumptions to make it easier for a claimant to reopen and

then easier to obtain an enhanced award.[15] *Rambo II*, 117 S. Ct. at 1963 n.9, 1964. The decision of the court below and the one element rule operate through the application of two impermissible burden-shifting presumptions, at least one of which is mandatory or irrebuttable. That result cannot be permitted under *Greenwich Collieries* and *Rambo II*.

C. The Questions Presented Have a Significant Impact

Mine operators and insurers doing business in the Eighth Circuit as well as the Fourth Circuit and elsewhere have a significant interest in finality that is recognized and protected by law. Today, that interest is honored only in the Seventh and Tenth Circuits in black lung cases. There has been no legislative give and take in which Congress decided to lessen the reasonable expectations of finality and the agency has not provided a fair opportunity to address the legal and scientific questions in a dispassionate environment. The ABA's extraordinary involvement underscores DOL's apparent lack of concern for the important rights granted by the APA and the

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[15] *Rambo* also is a far easier case in which to argue in favor of a scheme permitting reopening. Rambo proved he had an occupational injury in the original adjudication. Harvey was proven not to have black lung disease in four separate adjudications. Moreover, for Mr. Rambo, the reopening scheme is built into the statute, relying ultimately on sections 8(h) and 22 of the LHWCA. The one element rule has no statutory basis and departs from many statutory provisions in the BLBA and the LHWCA that contemplate finality. Section 8 of the LHWCA expressly does not apply in black lung claims. 30 U.S.C. § 932(a) (stating that section 8 is not incorporated).

normal rules of finality. The issues presented and the deprivation of rights that frames them are jurisprudentially important and worthy of this Court's review.

Moreover, DOL's one element solution is a substantial reinvention of the black lung program that has added significant unanticipated and uninsured costs for self-insured employers and commercial insurance carriers. Since DOL first began advocating the one element rule, refilings have jumped substantially and by 1997, the number of refilings approached the number of first filings. By 1995, DOL's workload reports showed almost 40% of the backlog of unadjudicated claims consisted of refilings by miners with at least one or more prior finally denied claims. The approval rate for refilings does not differ greatly from the approval rate for first-time filers. Moreover, the average transactional or litigation costs for all filings is $6,069 per claim.

Most refilers, like Harvey, last worked years ago and their benefits and claim costs were insured or self-insured under old insuring agreements the cost of which was based upon expectations that ordinary rules of finality would apply and that there would be only one round of litigation. Those agreements are not funded for the repeated costs of re-litigation or the extra awards made to persistent refilers. There still are tens of thousands of miners whose claims have been denied and the average undiscounted cost of a claim of a married miner between 40 and 75 years of age ranges from $102,485 to $658,479. The one element rule may add $1 billion or more to the cost of the black lung program according to actuarial consultants to the coal and insurance industries.

DOL's effort to waive res judicata in black lung claims promises to add substantially to the cost of the program and was not anticipated. The cost will fall disproportionately on mine operators and insurers doing business in the Third, Fourth, Sixth and Eighth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 95-4122

Lovilia Coal Company; Old Republic Insurance Company, Petitioners,

v.

Wesley Harvey; Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

Submitted: Sept. 11, 1996

Filed: March 21, 1997

Before RICHARD S. ARNOLD, Chief Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

HENLEY, Senior Circuit Judge.

Lovilia Coal Company and its insurance carrier, Old Republic Insurance Company, (collectively Lovilia), petition for review of an order of the Benefits Review Board (Board) of the Department of Labor (DOL) awarding benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the Act), to Wesley Harvey, a former coal miner employed by Lovilia. We affirm the award of benefits.

Background

Harvey, who was born in 1914, worked in coal mines from 1930 until 1975, when he retired after working more than ten years for Lovilia. Harvey first filed a claim for

black lung benefits in 1973, which was denied. In 1977, Congress liberalized eligibility requirements for benefits, and Harvey's claim was reopened and reviewed under the more lenient standards, 30 U.S.C. § 945, but was denied. Harvey again filed claims for benefits in 1983, 1984 and 1987, which were all denied. In March 1990, Harvey again applied for benefits. The deputy director denied the claim, finding that Harvey had not established a material change in conditions. *See* 20 C.F.R. § 725.309(d) ("If [an] earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy director determines that there has been a material change in conditions."). However, after Harvey submitted additional medical evidence and appeared before an administrative law judge (ALJ), the ALJ awarded benefits. The ALJ found that the additional evidence not only showed a material change in conditions, but also showed that Harvey was "totally disabled due to pneumoconiosis." *See* 30 U.S.C. § 901. In addition, the ALJ rejected Lovilia's argument that 30 U.S.C § 932 transferred liability for payment of benefits from the company to the Black Lung Disability Trust Fund. Lovilia appealed to the Board. The Board rejected Lovilia's arguments relating to transfer of liability and material change, but held that the ALJ had erred in concluding that Harvey was totally disabled due to pneumoconiosis by relying solely on the opinion of Harvey's treating physician, Dr. Gordon Arnott. Accordingly, the Board remanded the case for a reconsideration based on all the evidence of record. On remand, the ALJ again awarded benefits. The Board affirmed, and this petition for review follows.

DISCUSSION

On appeal Lovilia first renews its argument that if Harvey is entitled to benefits, section 205 of the Black Lung Benefits Amendments of 1981, Pub.L. 97-119, Title II, 95 Stat 1635 (1981), codified at 30 U.S.C. §§ 932(c)(2), (j)(3), transferred liability for payment of the benefits from the company to the Black Lung Disability Trust Fund (Fund). Lovilia next raises several challenges to 20 C.F.R. § 725.309(d), the "material change" regulation. In the event this court rejects its arguments relating to transfer of liability and material change, Lovilia goes on to argue that Harvey is not entitled to benefits.

Initially, we note that Lovilia's presentation of "the issues reverses the usual order of inquiry; that is, we determine who should pay before establishing whether the claimant is eligible for benefits." *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 601 n. 1 (3d Cir. 1989). "In this case, however, the government conceded that [Harvey] was eligible for benefits." *Id.* "Thus, if we determine that liability should be transferred to the government's Trust Fund we need not address the issue of whether [Harvey] is eligible for benefits." *Id.* In addition, we note that the regulations, 20 C.F.R. § 725.497(c), contemplate that transfer issues should be decided "as early as possible in the process – even before final disposition of the miner's claim." *Big Horn Coal Co. v. Office of Workers' Comp. Prog.*, 55 F.3d 545, 551 n. 7 (10th Cir. 1995). "Consequently, we will consider the transfer issue before approaching the eligibility issue." *Krecota*, 868 F.2d at 601 n. 1.

Transfer of Liability

As previously indicated, in 1977 Congress "substantially liberalized the criteria for establishing an entitlement to benefits." *Tonelli v. Director*, 878 F.2d 1083, 1084 n. 2 (8th Cir. 1989). In addition, Congress provided that "[c]laims denied before March 1, 1978 (the effective date of the 1977 amendments) were to be reexamined under these less demanding standards." *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987). In order to relieve coal companies of unexpected retroactive liability, in 1981 "Congress provided that liability for claims denied before March 1, 1978 which were thereafter approved under the liberalized eligibility criteria should be transferred from coal operators to the Black Lung Disability Trust Fund." *Director v. Drummond Coal Co.*, 831 F.2d 240, 242 (11th Cir. 1987) (citing 30 U.S.C. §§ 932(c),(j)).[1] As relevant here, 30 U.S.C § 932(c) provides:

> no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

Section 932(j) provides that the Trust Fund is liable for "payment of benefits in cases . . . in which there was a claim denied before March 1, 1978, and such claim is or

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[1] In addition, the 1981 amendments, which were enacted in response to a large deficit in the Trust Fund, raised taxes on coal operators and tightened eligibility requirements. *See Hawkins v. Director*, 907 F.2d 697, 702 n. 8 (7th Cir. 1990); *see also Lopatto, The Federal Black Lung Program: A 1983 Primer*, 85 W.Va.L.Rev. 677 (1983).

has been approved in accordance with the provisions of section 945 of this title." At the time of the enactment of the 1981 amendments and at all relevant times, DOL regulations defined a claim as "an assertion in writing of an individual's entitlement to benefits." 20 C.F.R. § 725.101(a)(22) (1977) (recodified at 20 C.F.R. § 725.101(a)(16) (1994)).

In this case, the Board upheld the ALJ's rejection of Lovilia's transfer of liability argument. The Board reasoned that the only claim pending before the ALJ was Harvey's claim of March 1990 and that the claim could not support a transfer of liability since it was not, and could not have been, denied before March 1, 1978. The Board noted that although Harvey's 1973 claim had been denied before March 1, 1978, it had been denied, not approved, after review under section 945.

Lovilia argues that the Board has misinterpreted the term "claim," as used in section 932. Lovilia asserts that under the plain meaning of the statute "claim" does not mean an application for benefits, but means liability. Lovilia reasons "to insurers 'claims' do not mean 'claim forms' or applications. It means liability." Lovilia's Br. at 27. The Director responds that "claim" plainly means an application for benefits. We agree with the Director. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, ___ U.S. ___, ___, 117 S.Ct. 843, 846 (1997). As relevant here, the dictionary defines "claim" as "a demand for compensation or benefits (as one in accordance with the

provisions of the Social Security Act or workmen's compensation law"), *Webster's Third New Int'l Dictionary* 414 (1965), and the Black Lung Act provides that a claim for benefits must be filed timely and in a prescribed manner. *See, e.g.*, 30 U.S.C. §§ 923, 924, 932. Moreover, as the Director points out, at the time of the 1981 amendments, "Congress was aware of the regulation['s] definition, but did not enact any provisions to alter the definition." *Pagel, Inc. v. CIR*, 905 F.2d 1190, 1192 (8th Cir. 1990).

In addition, we agree with the Director that even if the term "claim" was ambiguous, the legislative history makes clear that it means an application for benefits. Because Congress was concerned that a "transfer of liability could prove too burdensome for the debt-laden Trust Fund, legislators specifically requested information on how many claims would transfer, which claims they were and what the cost would be" and relied on estimates that the amendment would transfer about 10,200 claims, valued at approximately $1.4 to $1.5 billion. *Old Ben Coal Co.*, 826 F.2d at 694 (citing Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 31, 77 (1981)); *see also Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 672 (6th Cir. 1988) ("Legislative history shows that the transfer of liability provisions of the 1981 Amendments reflect a congressional intent to accommodate only a limited number of claims within estimated cost limitations."). In any event, if any ambiguity existed, we would defer to DOL's reasonable interpretation of the statute it is charged with administering. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). DOL's transfer of liability regulation makes clear that unless a

claim is subject to merger, 20 C.F.R. § 725.309(c), "the procedural history of each . . . claim must be considered separately to determine whether the claim is subject to the transfer of liability provisions." *Id.* § 725.496(c).[2]

Res Judicata

Lovilia also argues that consideration of Harvey's 1990 claim is barred by the doctrine of res judicata. The doctrine "consist[s] of two preclusion concepts: 'issue preclusion' and 'claim preclusion.' " *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1 (1984). Under claim preclusion, " 'a final judgment on the merits bars further claims by the parties or their privies based on the same cause of action.' " *United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)), *cert. denied*, 116 S.Ct. 73 (1995). Under issue preclusion, or, as it is sometimes called collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, 'the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' " *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996) (quoting Restatement (Second) of Judgments § 27 (1982)), *pet. for*

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[2] Lovilia does not, and could not, argue that Harvey's 1990 claim merged with his 1973 claim. *See Tonelli v. Director*, 878 F.2d 1083, 1087 (8th Cir. 1988) (under 20 C.F.R. § 725.309(c) "merger is available only when a previously denied claim, reopened for review under [30 U.S.C. § 945], and a second claim are pending at the same time"). Because the claim is not subject to merger, it is governed by the criteria of 20 C.F.R Part 718. If the claim had been merged, "then the more liberal criteria of 20 C.F.R. 727 would have governed." *Tonelli*, 878 F.2d at 1084 n. 3.

cert. filed, 65 U.S.L.W. 3539 (U.S. Jan. 27, 1997) (No. 96-1207).

Relying on claim preclusion, Lovilia argues that Harvey's 1990 claim was merely a "recycled" version of his 1973 claim and by "obtain[ing] a better lawyer and a friendlier ALJ, he finally was able to get benefits." Lovilia's Br. at 18, 31.[3] Lovilia notes that in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 123 (1988), the Supreme Court made clear that a black lung claimant may not "seek[ ] to avoid the bar of res judicata on the ground that the decision was wrong."

Contrary to Lovilia's assertion, Harvey was not attempting to relitigate the previous denials of earlier claims; rather, he was attempting to establish entitlement to benefits based on a change in conditions since the denials. In such circumstances, res judicata does not bar his claim. As the Fourth Circuit has stated, "res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times." *Lisa Lee Mines v. Director*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc) (quoting 3 A. Larson, *The Law of Workmen's Compensation*, § 79.72(f) (1989)), *cert. denied*, 117 S.Ct. 763 (1997). This is so because "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication." *Id.* The Third Circuit also has explained that

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[3] Lovilia refers to the preclusive effect of an administrative determination in a subsequent administrative proceeding, rather than the preclusive effect of an administrative determination in a court proceeding. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106 (1991).

although a black lung claimant is "precluded from collaterally attacking the prior denial of benefits, [he] may file a new claim, asserting that he is *now* eligible for benefits because he has become totally disabled due to coal miner's pneumoconiosis and that his disability occurred subsequent to the prior adjudication." *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995) (footnote omitted). Simply stated, "[r]es judicata is not implicated when a miner brings a duplicate claim so long as the claimant demonstrates that his or her physical condition . . . has changed." *Wyoming Fuel Co. v. Director*, 90 F.3d 1502, 1510 (10th Cir. 1996).

Lovilia argues that these cases are wrongly decided because they are premised upon the erroneous assumption that pneumoconiosis – which under the Act, 30 U.S.C. § 902(b), "means a chronic dust disease of the lung . . . arising out of coal mine employment"[4] – is a progressive disease. For the same reason, Lovilia argues that 20 C.F.R. § 725.309(d), which, as indicated, allows for review of a subsequent claim after a denial of a previous claim if a miner demonstrates a "material change in conditions," violates res judicata. Specifically, Lovilia contends that if a coal miner does not have pneumoconiosis or is not disabled by it at the time of an initial denial and thereafter does not return to work in the mines, he cannot develop the disease or become disabled by it, and thus

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[4] "For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to . . . dust exposure in the coal mine employment." 20 C.F.R. § 718.201.

could never establish a change in conditions. We disagree. Quoting *Mullins Coal Co. v. Director*, 484 U.S. 135, 151-52 (1987), this court has recognized that " 'pneumoconiosis is a progressive and irreversible disease.' " *Robinson v. Missouri Mining Co.*, 955 F.2d 1181, 1185 (8th Cir. 1992). Moreover, we have noted that "pneumoconiosis is a progressive disease which (according to medical testimony accepted by Congress) is difficult for miners and doctors to identify." *Newman v. Director*, 745 F.2d 1162, 1164 (8th Cir. 1984). Although Lovilia contends that the statements in our opinions, as well as in the opinions of the Supreme Court and other courts of appeals, *see, e.g., Labelle Processing*, 72 F.3d at 314 (listing cases "acknowleg[ing] that pneumoconiosis is a progressive and irreversible disease") are mere dicta, we disagree and will not revisit the issue.

Material Change in Conditions

We next address Lovilia's argument that the ALJ applied the wrong standard in determining that Harvey had demonstrated a "material change" in conditions. As previously indicated, 20 C.F.R. § 725.309(d), in relevant part, provides that "[i]f [an] earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy director determines that there has been a material change in conditions." Neither the statute nor the regulations define "material change." In this case, the ALJ applied the Benefits Review Board's standard set forth in *Spese v. Peabody Coal Co.*, 11 Black Lung Rep. 1-174, 1-176 (Ben.Rev.Bd. 1988) (per curiam), which holds that a claimant can establish a material change by submitting "evidence which is relevant and probative so that there is a

reasonable probability that [it] would change the prior administrative result."

We do not address the validity of the *Spese* standard at length. The Director acknowledges that "[e]very circuit that has addressed the validity of the *Spese* standard has rejected it[,]" *Wyoming Fuel Co. v. Director*, 90 F.3d at 1508 (listing cases), and concedes it is wrong. In *Wyoming Fuel*, the court explained that appellate courts had rejected the *Spese* standard because it "violates principles of res judicata by permitting a claimant – when attempting to show a material change – to present evidence that merely shows the initial decision was in error, rather than limiting the evidence to that which shows that the claimant's condition has worsened since the previous denial." *Id.* at 1508-09.

Instead, the Director asks this court to adopt his "one-element" standard, as did the Third Circuit, *Labelle Processing Co. v. Swarrow*, 72 F.3d at 318; Fourth Circuit, *Lisa Lee Mines v. Director*, 86 F.3d at 1363; and Sixth Circuit, *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994). Under the Director's standard, an ALJ "making a material change determination must consider whether the weight of the new evidence of record (that is, the evidence developed since the denial of the earlier claim), submitted by all the parties, establishes at least one of the elements of entitlement previously adjudicated against the miner." Director's Br. at 32. In order to establish entitlement to black lung benefits, a claimant has to establish three elements: "[1] total disability; [2] that disability was caused 'at least in part by pneumoconiosis;' [3] that 'disability arose out of coal mine employment.' "

Barnes v. ICO Corp., 31 F.3d 678, 680 (8th Cir. 1994) (quoting *Mullins v. Director*, 484 U.S. at 141). Moreover, "[t]he element in question must be one capable of change," for example, the existence of pneumoconiosis or total disability. Director's Br. at 33. If a claimant presents such evidence, "[a]bsent contrary evidence clearly demonstrating that the denial of the initial claim was a mistake," an inference of material change is "compelled" and an ALJ "must then consider whether all the evidence in the record, including the evidence predating the denial of the prior claim, supports an entitlement to benefits." *Id.*

The Director acknowledges that the Seventh Circuit, *Sahara Coal Co. v. Office of Workers' Comp. Prog.*, 946 F.2d 554, 556 (7th Cir. 1991),[5] and Tenth Circuit, *Wyoming Fuel Co. v. Director*, 90 F.3d at 1511,[6] do not follow his "one-element" approach. However, the Director reminds this court that "[w]hen, like in this case, the issue is whether the agency has erred in interpreting its own regulations,

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[5] In *Sahara Coal*, the Seventh Circuit held that "[a] material change in conditions means either that the miner did not have black lung disease at the time of first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." 946 F.2d at 556. However, the court believed that "[i]t is not enough that the new application be supported by new evidence of disease or disability, because such evidence might show merely that the original denial was wrong." *Id.*

[6] In *Wyoming Fuel*, the Tenth Circuit held that "a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." 90 F.3d at 1511.

the Supreme Court has stated that: provided the agency's interpretation 'does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527 (8th Cir. 1995) (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)). As the Director points out, this means we may not " 'reject reasonable administrative interpretation even if another interpretation may also be reasonable.' " *Id.* (quoting *Creighton Omaha Reg'l Health Care Corp. v. Bowen*, 822 F.2d 785, 789 (8th Cir. 1987)).

We first reject Lovilia's argument that the Director's one-element approach is not entitled to *Chevron* deference because it is inconsistent with his past positions. "Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal." *See Smiley v. Citibank*, 116 S.Ct. 1730, 1734 (1996). Unless a change is arbitrary or capricious or an abuse of discretion, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* We also reject Lovilia's related argument that no deference is due because the Director's position is a mere litigating position. In the circumstances of this case, the Director's "position is in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer v. Robbins*, 1997 WL 65558-6 (Feb. 17, 1997) [117 S.Ct. 905, 911] (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). "There is simply no reason to suspect that the [Director's] interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.*

Lovilia also contends that the Director's one-element standard is not entitled to deference because it violates section 7(c) Administrative Procedures Act (APA), 5 U.S.C. 556(d), which requires that "the proponent of a rule or order has the burden of proof." Lovilia relies on *Director v. Greenwich Collieries*, 512 U.S. 267 (1994). In *Greenwich Collieries*, the Supreme Court invalidated the DOL's "true doubt" rule, which provided that if the evidence was evenly balanced, a black lung claimant was entitled to benefits. The Court held that the rule violated section 7(c) because it "shifted the burden of persuasion to the party opposing the benefits claim." *Id.* at 269.

Here, Lovilia argues that the Director's one-element approach impermissibly shifts the burden of persuasion from the claimant to the coal company. We disagree. There is no dispute that the Director's interpretation creates a presumption – that is, it calls for an "inference of an ultimate fact from a predicate one." *Mullins*, 484 U.S. at 157 n. 30. However, the presumption does not violate *Greenwich Collieries*. In fact, in that case, the Court noted that "due to Congress' recognition that [black lung] claims . . . would be difficult to prove, claimants . . . benefit from certain statutory presumptions easing their burden." 512 U.S. at 280 (citing *e.g.* 30 U.S.C. § 921(c)). In addition, the Court recognized that DOL's "solicitude for benefits claimants is reflected in the regulations adopting additional presumptions." *Id.* (citing 20 C.F.R. §§ 718.301-718-306). The Court indicated that the statutory and regulatory presumptions which ease a claimant's burden of production (*i.e.*, "a party's obligation to come forward with evidence supporting its claim") do not violate the APA. 512 U.S. at 272. The Court

distinguished the true doubt rule from those presumptions because the rule "attempt[ed] to go one step further" and "[i]n so doing," *id.* at 280, impermissibly shifted the burden of persuasion (*i.e.*, "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose"). *Id.* at 272. In this case, the Director's interpretation is akin to the statutory and regulatory presumptions which ease a black lung claimant's burden of production, but do not shift the burden of persuasion, as that term is used in *Greenwich Collieries*. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) (" 'Burdens of persuasion affect the outcomes only of cases in which the trier of fact thinks that plaintiff's and defendant's positions equiprobable.' ") (quoting *Bristow v. Drake St., Inc.*, 41 F.3d 345, 353 (7th Cir. 1994)).

Lovilia also argues that the Director's one-element standard violates due process. "Like all rules of evidence that permit an inference of an ultimate fact from a predicate one, black lung benefits presumptions rest on a judgment that the relationship between the ultimate and the predicate facts has a basis in the logic of common understanding." *Mullins*, 484 U.S. at 157 n. 30. To satisfy due process concerns, however, "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (internal quotation omitted). Moreover, the Supreme Court has recognized that "[t]he process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or

completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Id.* (quotation omitted). We also keep in mind that "black lung presumptions, no less than any presumption established or recognized in law, are the product of both factual understandings and policy concerns." *Mullins*, 484 U.S. at 157.

In this case, Lovilia argues that the Director's standard violates due process because there is no rational connection between the fact presumed – material change – and the fact proved – new evidence of disease or disability. However, Lovilia's argument is based on the premise that pneumoconiosis is not a progressive disease, a premise we have previously rejected. Lovilia also argues that the presumption is irrational because new evidence of disease or disability "might show merely that the original denial was wrong, and would thereby constitute an impermissible collateral attack on that denial." *Sahara Coal*, 946 F.2d at 556.

The Director counters that Lovilia misunderstands his standard. The Director asserts that his standard is faithful to the language of the regulation and to both claim and issue preclusion principles. The Director maintains that his standard ensures that a miner has experienced a material change in conditions and prevents an impermissible collateral attack on a previous denial by presuming that the initial denial was correct and requiring the claimant to establish an element of entitlement capable of change with new evidence. For example, the Director explains that if a miner was found not to have pneumoconiosis at the time of an earlier denial, and he

thereafter establishes that he has the disease, in the absence of evidence showing the denial was a mistake, an inference of "material change" is not only permitted but "compelled." We agree. *Cf. Mullins*, 484 U.S at 158-59 ("Secretary's reading of the interim presumption's invocation burden satisfies both the purposes of the statute and the need for a logical connection between the proven fact and the presumed conclusion.") (footnote omitted).

The Director also asserts that his one-element standard promotes administrative and judicial efficiency, while at the same time respects issue preclusion principles, which requires that a determination of an issue "must have been essential to the final judgment." *Tyus*, 93 F.3d at 453. In the context of a black lung claim, the Fourth Circuit explained, "[a] black lung claimant must prove every element of his claim. If he loses on one, or two, or three elements, the end result is the same: a denial." *Lisa Lee Mines*, 86 F.3d at 1363. Under issue preclusion principles, "holdings in the alternative, either of which independently would be sufficient to support the result . . . [are] not conclusive with respect to either issue standing alone." *Id.* (internal quotation omitted); *see also Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993 (4th Cir.) ("where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment"), *cert. denied*, 484 U.S. 913 (1987). "For this reason, if [a black lung claimant] loses on more than one element, but only one is in fact a correct basis for denial, the law does not impose a duty upon him to file a meaningless appeal to 'correct' the erroneous alternative holdings." *Lisa Lee Mines*, 86 F.3d at 1363.

Also, for this reason, the Director asserts that once a claimant establishes entitlement to one element with new evidence, he can establish entitlement to the remaining elements with old evidence.

As the Fourth Circuit noted, "[a] rational system would simultaneously account for the progressiveness of the disease, discourage useless appeals of alternate holdings, and require, at the threshold, a palpable basis to believe that conditions have changed over time." *Lisa Lee Mines*, 86 F.3d at 1364. We agree with the Fourth Circuit that "[t]he Director's 'one-element' approach accomplishes this difficult task." *Id.* at 1364-65. We thus reject Lovilia's due process argument.

Apparently realizing the weakness of its due process argument, Lovilia concedes that the presumption "might not be so bad if the inference of changed conditions" was rebuttable. Lovilia's Reply Br. at 15. However, Lovilia asserts because the presumption is irrebuttable, it is "illegal," but does not explain why. An irrebuttable, or "conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate." *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989). Although the Director does not dispute that his standard creates a mandatory presumption, that is it "compels" rather than permits an inference, *see First Dakota Nat. Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 813 (8th Cir. 1993), the Director argues it does not create an irrebuttable presumption because it allows an employer to dispute the presumed fact.

The Director is correct that as a technical matter his interpretation does not create an irrebuttable presumption. If, however, it did, or as a practical matter it does, it is not illegal. In *Michael H.*, the Supreme Court recognized some confusion about its so-called "irrebuttable presumption cases" and explained that the "cases must ultimately be analyzed as calling into question not the adequacy of procedures but – like our cases involving classifications framed in other terms, . . . – the adequacy of the 'fit' between the classification and the policy that the classification serves." 491 U.S. at 121 (internal citation omitted). As just discussed, we find that there is an "adequate fit" between the Director's one-element standard and the finality and efficiency policies it is designed to serve. Moreover, as the Director notes, his interpretation serves the remedial purpose of the Act. *See Labelle Processing*, 72 F.3d. at 318.

Because we find that the Director's interpretation of 20 C.F.R. § 725.309(d) is reasonable, we join the Third, Fourth and Sixth Circuits[7] in adopting the Director's one-element standard, and do not address the Seventh and Tenth Circuit approaches. Even if we found that they were also reasonable, we would be obligated to defer to the Director's standard.[8]

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[7] Like the Fourth Circuit in *Lisa Lee Mines*, "[w]e do not endorse . . . the closing paragraph of *Sharondale Corp.*, 42 F.3d at 999, where . . . the Sixth Circuit seems to have required consideration of evidence behind the earlier denial to determine whether it 'differ[s] qualitatively' from the new evidence." 86 F.3d at 1363 n. 11.

[8] We note, however, our agreement with the Tenth Circuit's criticism of the Seventh Circuit's *Sahara Coal* standard, *Wyoming*

Harvey's Claim

Finally, we turn to Harvey's claim. Lovilia asserts that if this court adopts the Director's one-element standard, then we must remand so that the ALJ can apply the standard. The Director and Harvey contend that a remand is unnecessary because the evidence submitted in support of Harvey's 1990 claim, as a matter of law, not only demonstrates a material change in conditions, but, as the ALJ found, that, as of March 1, 1990, Harvey was totally disabled by pneumoconiosis and is thus entitled to benefits.

In support of his present claim for benefits, Harvey submitted a November 1992 letter by Dr. Gordon Arnott, in which the doctor stated:

> This man has worked in the coal mines for 32 years. During the last four years, he had considerable trouble with breathing. He has X-Ray findings of Black Lung Disease.
>
> Mr. Harvey requires breathing treatment, medication to dilate his lungs, inhaler treatments, and cortisone injections to help him with his breathing. He has been in the hospital with this condition on numerous occasions.
>
> He will continue to be disabled by this problem.

In addition, Harvey submitted medical records showing that Dr. Arnott had treated Harvey for breathing problems since 1988, including hospitalizations solely

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Fuel, 90 F.3d at 1509-10, but for reasons stated above, we tend to disagree with the Tenth Circuit that the Director's interpretation of 20 C.F.R. § 725.309(d) is not entitled to deference.

because of breathing problems or where his pulmonary condition was a significant diagnosis. For example, in August 1991, Harvey was admitted to the hospital after he came to the emergency room "severely short of breath and unable to function at all" and breathing treatments "were not real effective." He was again admitted in September 1991 for "marked shortness of breath, dyspnea, and wheezing."

In the circumstances of this case, we agree with the Director that a remand is unnecessary. As to material change, in this case, there is no question "whether the ALJ merely disagreed with the previous characterization of the strength of the evidence or whether [Harvey] indeed had shown the existence of a material change in his conditions since the earlier denial." *Sharondale Corp.*, 42 F.3d at 999. In this case, the ALJ expressly found that the "hospital records dramatically demonstrate that [Harvey's] respiratory status has worsened substantially" since the previous denial, and that the evidence showed both the existence of pneumoconiosis and disability. ALJ order of July, 28, 1993 at 7. Thus, a remand for a material change finding "would serve no useful purpose." *Olson v. Shalala*, 48 F.3d 321, 323 (8th Cir. 1995); *see also Lisa Lee Mines*, 86 F.3d at 1362 (although ALJ applied *Spese* standard, remand unnecessary where claimant "ha[d] shown a stark change in condition").

As to entitlement, Lovilia challenges the ALJ's findings that Harvey had pneumoconiosis, that it arose out of coal mine employment, and that Harvey was totally disabled by the disease. We, like the Board, must uphold "an ALJ's findings if they are rational, supported by substantial evidence, and consistent with the applicable law."

Associated Elec. Coop., Inc. v. Hudson, 73 F.3d 845, 848 (8th Cir. 1996).

On appeal, Lovilia concedes that the "Act does not require positive X-rays[,]" *id.* at 848 (citing 20 C.F.R. § 718.202(b) ("[n]o claim for benefits shall be denied solely on the basis of a negative chest X-ray")). Indeed, the regulations provide that a determination of pneumoconiosis may be made "if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers from pneumoconiosis." 20 C.F.R. § 718.202(a)(4). However the doctor's finding must be "based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories" and be "supported by a reasoned medical opinion." *Id.* In addition, a determination of "total disability may be [ ] found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents him" from performing his usual coal mine duties or comparable work. *Id.* § 718.204(c)(4).

Lovilia also recognizes that in evaluating medical opinions an ALJ may assign great weight to the opinion of a treating physician. *Hudson*, 73 F.3d at 848. However, Lovilia incorrectly asserts that there is no record evidence showing that Dr. Arnott was in fact Harvey's treating physician. As the ALJ noted, the medical records clearly show that Dr. Arnott had treated Harvey for breathing problems since 1988. "Because [Dr. Arnott] regularly treated [Harvey] for his breathing problems . . . , the ALJ

had discretion to assign more weight to his opinion." *Id.* at 849.

Lovilia also incorrectly argues that the ALJ erred in concluding that Dr. Arnott's opinion was a reasoned medical opinion. Although it is "up to the finder of fact to decide as a matter of credibility whether a physician's report is sufficiently documented and reasoned[,]" *id.* at 848, as Lovilia points out, an ALJ must view the report "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Logsdon v. Director,* 853 F.2d 613, 615 (8th Cir. 1988) (internal quotation omitted). However, this does not mean that an ALJ may "use the studies to form his or her own medical opinion and to substitute that opinion for the opinion of an expert." *Id.* (internal quotation omitted).

In this case, the ALJ did not err in concluding that Dr. Arnott's opinion was well-documented and reasoned. The ALJ evaluated the doctor's opinion against the medical records. In fact, the ALJ discounted Dr. Arnott's statement that Harvey had X-ray evidence of pneumoconiosis because no X-rays of record supported that statement. The ALJ also noted the objective medical tests did not conclusively demonstrate the existence of pneumoconiosis, but found that Dr. Arnott's opinion was nonetheless well-documented because it was supported by records of numerous hospitalizations and treatments for breathing problems, physical examinations, consideration of objective tests, and work history. In *Campbell v. Director,* 846 F.2d 502, 508 (8th Cir. 1988), we found that a doctor's report was a "documented opinion of a physician exercising reasoned medical judgment" even though it differed from equivocal test results. We explained that "Congress has

recognized that tests and X-rays designed to detect pulmonary impairments caused by the inhalation of coal dust are far from infallible." *Id.* (internal quotation omitted). *See also Ware v. Director*, 814 F.2d 514, 517 (8th Cir. 1987) (equivocal test results did not impeach doctor's diagnosis of pneumoconiosis based on claimant's "medical history, employment history, and symptoms").

Also, contrary to Lovilia's arguments, the ALJ did not ignore the other medical evidence of record. The ALJ noted the earlier medical opinions indicated that Harvey did not have pneumoconiosis, but found they were not relevant since they did not address Harvey's condition at the time of the administrative hearing. *See Robinson v. Missouri Mining*, 955 F.2d at 1184 ("[a]s pneumoconiosis is a progressive disease," the ALJ should consider "temporal proximity . . . in determining which of two different medical opinions to credit"). The ALJ also noted that in 1987 Dr. Des Camps had reported that Harvey had obstructive lung disease due to coal dust exposure and cigarette smoking and that in April 1990 Dr. B.C. Hillyer diagnosed Harvey as having moderate chronic obstructive pulmonary disease due to cigarette smoking. Contrary to Lovilia's suggestion, these reports are not inconsistent with the ALJ's finding that as of March 1990 Harvey had pneumoconiosis and that it "arose *at least in part* out of coal mine employment." 20 C.F.R. § 718.203(a) (emphasis added).[9] *Cf. Hudson*, 73 F.3d at 849 (doctor's

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[9] "Because [Harvey] worked as a miner for more than 10 years, there is a rebuttable presumption that the pneumoconiosis arose out of coal mine employment." *Hudson*, 73 F.3d at 848 (citing 20 C.F.R. § 718.203(b)). As the ALJ found, no contrary evidence rebuts this presumption.

opinion that symptoms consistent with heart disease and smoking did "not contradict ALJ's separate findings that [claimant] suffered from pneumoconiosis and that it was a contributing cause of his disability"); *Consolidation Coal Co. v. Hage*, 908 F.2d 393, 394 (8th Cir. 1990) (employer's "cigarette defense" insufficient to rebut statutory presumption of existence of pneumoconiosis).

Accordingly, we affirm the Board's award of black lung benefits.

U.S. Department of Labor
Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

(SEAL)

BRB No. 95-0968 BLA
OWCP No. 482-09-8645

WESLEY HARVEY Claimant-Respondent v. LOVILIA COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 9 NOV 1995 DECISION and ORDER

Appeal of the Decision and Order on Remand of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Karen S. Rapaport (Arter & Hadden), Washington, D.C., for employer.

I. John Rossi, Des Moines, Iowa, for claimant.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-1132) of Administrative Law Judge Joel R. Williams awarding benefits on a claim filed pursuant

to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is on appeal to the Board for the second time. In his original Decision and Order issued March 25, 1993, the administrative law judge credited the miner with at least twenty-five years of coal mine employment and properly adjudicated this duplicate claim, filed on March 1, 1990, pursuant to 20 C.F.R. Part 718.[1] *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). After finding the evidence sufficient to establish a

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[1] The procedural history of this claim is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 14, 1973. Director's Exhibit 21. The SSA denied this claim on January 22, 1974, and March 5, 1976. *Id.* In a Decision dated August 26, 1976, Administrative Law Judge Glenn C. Parmalee denied the claim. *Id.* The Department of Labor also subsequently reviewed the claim, and the district director denied the claim on February 29, 1980. *Id.* The district director again denied the claim on March 27, 1981. *Id.* Claimant took no further action on this claim.

Claimant filed additional claims on April 29, 1983, October 26, 1984, and June 29, 1987, which were subsequently denied. Director's Exhibits 22-24. Again, claimant took no further action on these claims.

Claimant filed the instant claim on March 1, 1990. Director's Exhibit 1. On May 11, 1990, the district director issued a "Proposed Decision and Order of No Material Change in Condition and Denial of Claim." Director's Exhibit 10. On October 23, 1990, claimant submitted correspondence which the district director considered a request for modification under 20 C.F.R. §725.310. Director's Exhibit 11. On October 25, 1990, the district director denied claimant's request for modification. *Id.* In a Final Memorandum of Informal Conference dated January 29, 1992, the district director denied the claim. Director's Exhibit 19. Pursuant to claimant's request, Administrative Law Judge Joel R. Williams held a hearing on October 21, 1992.

material change in conditions pursuant to 20 C.F.R. §725.309, the administrative law judge found the medical evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that the evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c)(4). Accordingly, benefits were awarded. Employer subsequently filed a request for reconsideration/modification of the administrative law judge's decision, asserting that employer should be dismissed from the case and liability transferred to the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge found that employer was not entitled to be dismissed as the responsible operator and denied its motion.

On appeal, the Board affirmed the administrative law judge's findings that employer is properly designated the responsible operator and that liability should not be transferred to the Trust Fund, and further affirmed the administrative law judge's material change in condition findings and modification findings pursuant to Sections 725.309(d) and 725.310. Reviewing the administrative law judge's findings on the merits, the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(4) and 718.203(b), and further affirmed his findings at Section 718.204(c)(1)-(3). With respect to the administrative law judge's evaluation of the medical opinion evidence pursuant to Section 718.204(c)(4), the Board affirmed the administrative law judge's crediting of the medical opinions of Dr. Arnott, but further found, however, that in making his finding of total disability

pursuant to Section 718.204(c)(4), the administrative law judge had relied *solely* upon the opinion of Dr. Arnott. Consequently, the Board vacated the administrative law judge's findings pursuant to Section 718.204(c)(4), and remanded this case for the administrative law judge to weigh all contrary probative evidence together pursuant to *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987) and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987), in determining whether claimant's pneumoconiosis is totally disabling. The Board further vacated the administrative law judge's finding that claimant's totally disabling respiratory impairment was due in part to pneumoconiosis pursuant to Section 718.204(b), as the administrative law judge applied an incorrect standard for causation. Finally, the Board vacated the administrative law judge's onset of disability determination. Accordingly, the case was remanded to the administrative law judge for further consideration of these issues. *Harvey v. Lovilia Coal Co.*, BRB No. 93-1718 BLA (August 31, 1994) (unpublished).

On remand, the administrative law judge again found claimant totally disabled due to pneumoconiosis pursuant to Section 718.204(b), (c)(4). The administrative law judge further found the date of onset of claimant's disability to be March 1, 1990, the month in which claimant filed the instant claim for benefits. In the instant appeal, employer again asserts that liability for benefits, if any, should transfer to the Trust Fund, and further challenges the administrative law judge's findings pursuant to Sections 725.309, 725.310, 718.204(c)(4) and 718.204(b). Claimant responds urging affirmance of the

administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a limited response brief.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, we note that employer's arguments with respect to transfer of liability and the employer's challenge to the administrative law judge's findings pursuant to Section 725.309 and 725.310, were previously fully addressed and decided by the Board. As employer has not introduced any evidence on remand which would demonstrate a change in the facts of this case, or presented any intervening case law which would impact on the outcome of this case, or shown that the Board's prior holding was either clearly erroneous or manifestly unjust, we decline to revisit these issues. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

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[2] We affirm as unchallenged on appeal the administrative law judge's findings with respect to the onset of disability and the commencement of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer further asserts that the administrative law judge erred in finding the evidence of record sufficient to establish the existence of a totally disabling respiratory impairment pursuant to Sections 718.204(c)(4), as all of the objective studies are non-qualifying and as none of the physicians of record conclusively opined that claimant is disabled due to a respiratory or pulmonary impairment. Petition for Review at 27-31. Contrary to employer's arguments, however, Dr. Arnott diagnosed pneumoconiosis and stated that claimant would "continue to be disabled by this problem," and the Board previously affirmed the administrative law judge's crediting of Dr. Arnott's opinion as reasoned and documented and supportive of a finding of a totally disabling respiratory impairment. Claimant's Exhibit 1; *Harvey, supra; see generally Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, as the administrative law judge permissibly accorded greatest weight to the opinion of Dr. Arnott based on his status as claimant's treating physician, and as the record clearly indicates that the administrative law judge has weighed Dr. Arnott's medical opinions against the contrary medical opinions and objective studies of record, Decision and Order on Remand at 3, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Honaker v. Jewell Ridge Coal Corp.*, 2 BLR 1-947, 1-954 (1980).

Employer next asserts that the administrative law judge erred in finding the evidence of record sufficient to establish that claimant's totally disabling respiratory

impairment is due at least in part to pneumoconiosis pursuant to Section 718.204(b). We disagree. Contrary to employer's arguments, although the administrative law judge did not discuss in great detail the medical opinions of record, as the administrative law judge properly and succinctly noted the relevant findings of each physician, and incorporated by reference his original Decision and Order, in which he fully discussed the specifics of each physician's report, the administrative law judge's decision is neither cursory nor unexplained, and comports with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). Therefore, as two of the three physicians offering an opinion relevant to the issue of causation opined that claimant's totally disabling respiratory impairment is due at least in part to pneumoconiosis, we affirm the administrative law judge's findings pursuant to Section 718.204(b). Decision and Order on Remand at 3; Claimant's Exhibit 1; Director's Exhibits 6, 24; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals
Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002
(SEAL)

In the Matter of:	DATE ISSUED: December 29, 1994
WESLEY HARVEY Claimant,	CASE NO.: 92-BLA-1132
v.	OWCP NO.: 428-09-8645
LOVILIA COAL COMPANY Employer.	

DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This proceeding arises from a claim for federal benefits under the "Black Lung Benefits Act", Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* ("Act"), and applicable federal regulations, mainly 20 C.F.R. Parts 410, 719 and 727 ("Regulations").

The Act and Regulations provide compensation and other benefits to: (1) living coal miners who are totally disabled due to pneumoconiosis and their dependents; (2) surviving dependents of coal miners whose death was due to pneumoconiosis; and (3) surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act an Regulations define pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. *See* §718.201.

Statement of the Case

On March 25, 1993, the undersigned issued a Decision and Order Awarding Benefits in the above-captioned case, and Employer, Lovilia Coal Company, appealed therefrom. Subsequently, the Benefits Review Board ("Board") issued a Decision and Order, dated August 31, 1994, in which the March 25, 1993 decision was affirmed in part, vacated in part, and remanded for further consideration consistent with its opinion.

The Board affirmed the undersign's findings that the Employer is the responsible operator and that liability in the instant case does not transfer to the Trust Fund. The Board also affirmed the undersign's finding of a material change in conditions pursuant to 20 C.F.R. §725.309 and that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board vacated the finding of total disability pursuant to 20 C.F.R. §718.204(c) and held that on remand the undersign must reconsider all the relevant evidence of record, assign appropriate weight to any contrary probative evidence and determine whether the contrary evidence outweighs the evidence supportive of a finding of total disability. Further, the Board held that if on remand the undersign finds the evidence sufficient to establish total disability he must reconsider

whether the evidence is sufficient to establish that Claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Next, the Board vacated the undersign's determination regarding the date of entitlement to benefits and held that if the medical evidence does not establish when Claimant became totally disabled due to pneumoconiosis then Claimant is entitled to benefits as of his filing date assuming on remand the undersign determines that the Claimant is totally disabled due to pneumoconiosis.

On December 8, 1994 the Employer filed a "Motion for Leave to File Employer's Brief on Remand . . . " in order to "clarify the issues and permit orderly and expeditious consideration on remand." As the issues on remand have been enunciated clearly by the Benefits Review Board; as the Employer waived closing argument in the hearing before me; as it has made its contentions in this case known in a 41 page original brief and 7 page reply brief filed with the Benefits Board; as additional briefing at this stage would delay, not expedite consideration of this matter, the Employer's motion is denied.

Findings of Fact and Conclusions of Law

Except as modified herein, the Findings of Fact and Conclusions set forth in the March 25, 1993 decision are incorporated herein.

The Board vacated the finding of invocation at §718.204(c) holding that I erred in determining that

Claimant had established total respiratory disability based solely upon Dr. Arnott's opinion. Pursuant to the Boards instructions I have reviewed the relevant evidence of record, weighed the medical opinions and once again find that Claimant has established total disability due to pneumoconiosis at §§718.204(c) and 718.204(b).

The early medical reports are not indicative of total disability due to pneumoconiosis, however, the later reports reveal the disease and the latest medical documents present convincing evidence of total respiratory disability pursuant to 20 C.F.R. §718.204(c) with pneumoconiosis being a contributing cause of disability pursuant to 20 C.F.R. §718.204(b). Pneumoconiosis is a progressive and irreversible disease and the probative medical evidence reveals the progression of the disease to the point where it caused Claimant to be totally disabled.

Although I thought I made it clear in my original Decision and Order perhaps I did not say so in so many words. I place greater weight on Dr. Arnott's opinion that the Claimant is disabled from respiratory impairment than I do on the results of pulmonary function tests, blood gas studies and other opinions of record. I do so because his opinion is based on his having treated the Claimant for four years. I do so because rarely have I seen a treating physician's opinion so well documented by records of repetitive, recent hospitalizations which were solely because of respiratory distress or where respiratory or pulmonary conditions were a significant diagnosis.

Dr. Knight determined that coal mine employment was at least a contributing cause for Claimant's chronic obstructive pulmonary disease in his November 14, 1984 medical report. Dr. Des Camps September 15, 1987 medical report revealed obstructive pulmonary disease which he related to coal dust exposure and cigarette smoking and opined that Claimant was totally disabled due pneumoconiosis and smoking. Dr. Arnott opined that the Claimant will continue to be totally disabled from pneumoconiosis. Dr. Arnott's last medical statement was submitted on February 17, 1992. Although Dr. Hillyer examined Claimant on April 6, 1990 and diagnosed chronic obstructive pulmonary disease caused by Claimant's cigarette habit, I find that the preponderance of evidence supports a finding of total disability due at least in part to pneumoconiosis.

Entitlement Date

The Board held that I erred in establishing October 1990 as the date which Claimant became totally disabled. After reviewing the medical evidence in accordance with the Boards instructions I have determined that the medical evidence while establishing total disability does not establish the date on which Claimant became totally disabled due to pneumoconiosis. Therefore, Claimant is entitled to benefits as of his filing date, March 1, 1990.

ORDER

My initial finding of disability and award of disability benefits is reinstated with the effective date being amended to read March 1, 1990.

/s/ Joel R. Williams
JOEL R. WILLIAMS
Administrative Law Judge

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(SEAL)

BRB No. 93-1718 BLA
OWCP No. 482-09-8645

WESLEY HARVEY Claimant-Respondent v. LOVILIA COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: AUG 31 1994 DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration/Modification of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

I. John Rossi, Des Moines, Iowa, for claimant.

Karen S. Rapaport (Arter & Hadden), Washington, D.C., for employer.

Cathryn Celeste Helm (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the

Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration/Modification (92-BLA-1132) of Administrative Law Judge Joel R. Williams awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Because the instant case involves a 1990 duplicate claim,[1] the administrative law judge initially found the

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[1] The procedural history of this case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 14, 1973. Director's Exhibit 21. The SSA denied this claim on January 22, 1974 and March 5, 1976. *Id.* In a Decision dated August 26, 1976, Administrative Law Judge Glenn C. Parmalee denied the claim. *Id.* The Department of Labor also subsequently reviewed the claim, and the district director denied the claim on February 29, 1980. *Id.* The district director again denied the claim on March 27, 1981. *Id.* The denial of this claim became final when claimant neither sought a hearing, nor submitted new evidence within the prescribed 60 day period, 20 C.F.R. §725.410(c), nor requested modification within the prescribed one year period. 20 C.F.R. §725.310(a).

Claimant filed additional claims on April 29, 1983, October 26, 1984 and June 29, 1987. Director's Exhibits 22-24. The respective denials of these claims also became final when claimant neither sought a hearing, nor submitted new evidence within the prescribed 60 day period, 20 C.F.R. §725.410(c), nor requested modification within the prescribed one year period. 20 C.F.R. §725.310(a).

evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The claim, having been filed on March 1, 1990, was properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718. After crediting claimant with more than twenty-five years of coal mine employment, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established total disability pursuant to 20 C.F.R. §718.204(c) and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. Employer subsequently filed a request for reconsideration/modification of the administrative law judge's decision. Employer argued that it should be dismissed from the case and liability transferred to the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge found that employer

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Claimant filed the instant claim on March 1, 1990. Director's Exhibit 1. On May 11, 1990, the district director issued a "Proposed Decision and Order of No Material Change in Condition and Denial of Claim." Director's Exhibit 10. On October 23, 1990, claimant submitted correspondence which the district director considered a request for modification under 20 C.F.R. §725.310. Director's Exhibit 11. On October 25, 1990, the district director denied claimant's request for modification. *Id.* In a Final Memorandum of Informal Conference dated January 29, 1992, the district director denied the claim. Director's Exhibit 19. Administrative Law Judge Joel R. Williams held a hearing on October 21, 1992.

was not entitled to be dismissed as the responsible operator and denied its motion. On appeal, employer contends that the administrative law judge erred in not transferring liability to the Trust Fund. Employer also argues that the administrative law judge erred in finding that claimant satisfied the requirements of 20 C.F.R. §§725.309 and 725.310. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) and (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's finding that liability in the instant case does not transfer to the Trust Fund. In a reply brief, employer reasserts its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially argues that the administrative law judge erred in not dismissing it from the case and transferring liability to the Trust Fund. We disagree. Claimant's Part B claim cannot support a transfer of liability because this claim has been finally denied and administratively closed. *See* Director's Exhibit 21. The only claim still viable and pending adjudication before the administrative law judge was claimant's new claim, which was filed on March 1, 1990. Director's Exhibit 1. This new claim cannot support a transfer of liability since it was not denied prior to March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, and it is not

subject to the provisions of Section 435 of the Act. 30 U.S.C. §932(j)(3); 26 U.S.C. §9501(d)(1)(B); *Hagerman v. Island Creek Coal Co.*, 11 BLR 1-116 (1988). We, therefore, affirm the administrative law judge's findings that employer is the responsible operator and that liability in the instant case does not transfer to the Trust Fund.

Employer next contends that the administrative law judge erred in not addressing whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310. In his consideration of claimant's 1990 claim, the district director issued a "Proposed Decision and Order of No Material Change in Condition and Denial of Claim" on May 11, 1990. Director's Exhibit 10. Claimant subsequently requested modification of the district director's denial of benefits. Director's Exhibit 11. On October 25, 1990, the district director denied claimant's request. *Id.* In a Final Memorandum of Informal Conference dated January 29, 1992, the district director again denied the claim. Director's Exhibit 19. Consequently, the issue properly before the administrative law judge was whether the evidence was sufficient to establish modification of the district director's May 11, 1990 denial of claimant's duplicate claim. An administrative law judge, however, is not required to render a preliminary determination regarding whether a claimant has established a basis for modification of a district director's denial of benefits prior to reaching the merits of entitlement. *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director*, 17 BLR 1-9 (1992). The administrative law judge, therefore, had the authority to address the merits of claimant's 1990 claim.

We note, however, that claimant's 1990 claim is a duplicate claim. Section 725.309 provides that a duplicate

claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The Board has defined a material change in conditions as that "evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result." *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *see also Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1990) (*en banc*); *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir. Feb. 6, 1989) (unpublished). Claimant's prior 1987 claim was denied because claimant failed to establish the existence of pneumoconiosis, that his pneumoconiosis was caused in part by his coal mine work, or that he was totally disabled due to pneumoconiosis. Director's Exhibit 24. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), claimant was required to submit new evidence, which if credited on the merits, could establish at least one of the four elements of entitlement under Part 718.[2] *See Shupink, supra.*

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R.

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[2] In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

§725.309. We disagree. The newly submitted medical evidence includes Dr. Arnott's discharge summary of claimant's November 18 to November 21, 1991 hospital stay. Claimant's Exhibit 1. On the discharge summary, Dr. Arnott includes black lung disease among his final diagnoses. *Id.* The newly submitted medical evidence also includes Dr. Arnott's February 17, 1992 statement wherein he indicates that claimant has x-ray findings of black lung disease. *Id.* Because there is a reasonable possibility that this evidence, if credited, could change the prior administrative result, the newly submitted evidence is sufficient as a matter of law to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Shupink, supra.* Consequently, we affirm the administrative law judge's finding of a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, properly considered claimant's 1990 claim on the merits.

Turning to the merits of the instant case, employer initially contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to Dr. Arnott's opinion based upon his status as claimant's treating physician. Decision and Order at 6; Claimant's Exhibit 1. An administrative law judge may properly accord more weight to the opinion of a treating physician. *See generally Schaaf v. Matthews,* 574 F.2d 157 (3d Cir. 1978); *Revnack v. Director, OWCP,* 7 BLR 1-771 (1985).

Employer, however, contends that the administrative law judge erred in not determining whether Dr. Arnott's opinion was sufficiently documented and reasoned. We disagree. Implicit in an administrative law judge's reliance upon a particular physician's opinion is a finding that the opinion is both reasoned and documented. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Inasmuch as Dr. Arnott's opinion is based upon symptomatology, patient history, and a physical examination, it is considered documented. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); Claimant's Exhibit 1.

We also reject employer's contention that Dr. Arnott's opinion is not well-reasoned. In a "History and Physical Record" form dated November 18, 1991, Dr. Arnott noted claimant had "a long history of black lung disease with emphysema." Claimant's Exhibit 1. Dr. Arnott also noted that claimant had "worked in a coal mine for a number of years." Finally, Dr. Arnott noted that his examination of claimant's lungs showed "a few rhonchi and some wheezing." *Id.* In his statement dated February 17, 1992, Dr. Arnott noted that claimant worked in the coal mines for thirty-two years and had x-ray findings of black lung disease. *Id.* Although aware that the record did not contain confirmation of Dr. Arnott's noted x-ray findings of black lung disease, the administrative law judge recognized that Dr. Arnott's diagnosis was also based upon his physical examinations and an awareness of claimant's employment history.[3] Decision and Order at 6. Inasmuch

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[3] There is no indication that Dr. Arnott based his diagnosis of black lung disease solely on x-ray findings. Claimant's Exhibit 1.

as Dr. Arnott provided an adequate basis for his diagnosis of black lung disease, the administrative law judge reasonably relied upon his opinion as reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

Employer next contends that the administrative law judge erred in finding Dr. Arnott's opinion sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer specifically argues that Dr. Arnott's opinion is deficient because the doctor did not address the *extent* of claimant's disability. In a February 17, 1992 letter, Dr. Arnott, after noting that claimant had x-ray findings of black lung disease and breathing problems, opined that claimant would "continue to be disabled by this problem."[4] Claimant's Exhibit 1. Because Dr. Arnott did not, in any way, qualify the extent of claimant's disability, we find no error in the administrative law judge's finding that Dr. Arnott's opinion supported a finding that claimant was totally disabled by his

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[4] Although not referenced by the administrative law judge, the record also contains a September 13, 1990 affidavit from Dr. Arnott. In the affidavit, Dr. Arnott states that claimant:

> has severly [sic] damaged lungs and must take medication at all times. He has worked in coal mines for approximately 30 years and this is a major cause of his problem of Black Lung and Emphysema.

Director's Exhibit 5.

respiratory problems. *See generally Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 6-7.

We agree, however, with employer that the administrative law judge erred in finding that claimant had established total respiratory disability based solely upon Dr. Arnott's opinion. In his Section 718.204(c) analysis, an administrative law judge must weigh all the relevant evidence together, both like and unlike, in reaching his conclusion. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*). In relying on Dr. Arnott's to establish total disability, the administrative law judge failed to consider the contrary probative evidence. We, therefore, vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge at 20 C.F.R. §718.204(c) must reconsider all the relevant evidence of record,[5] assign appropriate weight to

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[5] The administrative law judge properly noted that none of the pulmonary function studies of record are qualifying. Decision and Order at 7; Director's Exhibits 4, 21, 22, 24. Although the administrative law judge noted that the record contained a qualifying resting arterial blood gas study conducted in June of 1983, he noted that the exercise study done on the same date and all the subsequent arterial blood gas studies of record were nonqualifying. Decision and Order at 7; Director's Exhibits 7, 22-24; Claimant's Exhibit 1. The administrative law judge also noted that the record did not include a diagnosis of cor pulmonale. Decision and Order at 7. Inasmuch as no party challenges the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

any contrary probative evidence[6] and determine whether the contrary evidence outweighs the evidence supportive of a finding of total disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields, supra; Shedlock, supra.*

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[7] In finding the opinions of Drs. Arnott, Knight and Des Camps sufficient to establish that claimant's pneumoconiosis was a contributing cause of his respiratory disability, the administrative law judge noted that Drs. Knight and Des Camps had each opined that claimant's coal mine employment was at least a contributing cause of his chronic obstructive pulmonary disease. Decision and Order at 8-9; Director's Exhibits 23, 24. The fact that Drs. Knight and Des Camps related claimant's pulmonary disease to his coal mine employment, however, is not relevant to the issue at 20 C.F.R. §718.204(b). Section 718.204(b) concerns the etiology of a miner's disability, not the etiology of his lung disease. *See* 20 C.F.R. §718.204(b). The administrative law judge did not address whether the opinions of Drs. Knight and Des Camps

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[6] The term "contrary probative evidence" refers to all evidence, medical and otherwise, that is contrary and probative. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

[7] Inasmuch as the instant case arises within the appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit, claimant must establish that his pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc*).

support a finding that pneumoconiosis was a contributing cause of claimant's totally disabling respiratory impairment. Consequently, should the administrative law judge, on remand, find the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he must reconsider whether the evidence is sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

If claimant is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In the instant case, the administrative law judge found that claimant became totally disabled in October of 1990. Decision and Order at 7, 8. In making this determination, the administrative law judge apparently relied upon Dr. Arnott's diagnosis of "Acute bronchitis with chronic obstructive lung disease."[8] Dr. Arnott's diagnosis of acute bronchitis with

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[8] In December of 1988, Dr. Arnott diagnosed emphysema with bronchial asthma and superimposed bronchitis. Claimant's Exhibit 1. In December of 1989, Dr. Arnott diagnosed bronchitis with emphysema and asthma. *Id.* In either January of 1990 or October of 1990, Dr. Arnott diagnosed acute bronchitis with chronic obstructive lung disease. [The hospital chart indicates that claimant was admitted on 10/2/90 and discharged on 01/4/90. One of these dates appears to be a typographical error.] *Id.* In December of 1990, Dr. Arnott diagnosed acute asthmatic bronchitis and chronic obstructive lung disease. *Id.* In August of 1991, Dr. Arnott diagnosed an acute episode of chronic obstructive lung disease. *Id.* In September of 1991, Dr. Arnott diagnosed emphysema and acute respiratory distress. *Id.* After claimant's stay in the hospital from November 16, 1991 to November 17, 1991, Dr. Arnott diagnosed emphysema, asthmatic bronchitis and anemia. *Id.* After claimant's hospital

chronic obstructive lung disease, however, is insufficient to establish that claimant was totally disabled due to pneumoconiosis at the time of the diagnosis. *See generally Parsons v. Director, OWCP,* 6 BLR 1-272 (1983). Consequently, we vacate the administrative law judge's determination regarding the date of entitlement to benefits.

On remand, should the administrative law judge find claimant entitled to benefits, he must determine whether the medical evidence establishes when claimant became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless there is evidence, which if credited, establishes that claimant was not totally disabled at some point subsequent to his filing date. *Lykins, supra.*

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration/ Modification awarding benefits are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Acting
Chief Administrative Appeals
Judge

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stay in the hospital from November 18, 1991 to November 22, 1991, Dr. Arnott diagnosed, *inter alia,* emphysema and black lung disease. *Id.*

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals
Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

WESLEY HARVEY, Caimant [sic] v. LOVILLIA COAL CO., Employer and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party-in-Interest	Date: May 7, 1993 Case No.: 92 BLA 1132 OWCP No.: 482-09-8645

DECISION AND ORDER DENIAL OF MOTION FOR RECONSIDERATION/MODIFICATION

The Employer has moved for a reconsideration or modification of the Decision and Order which I issued in this case on March 25, 1993 in which I ordered it to pay benefits to the Claimant under Black Lung Benefits Act of 1977, as amended, 30 U.S.C. §901, *et seq.* (the "Act").

It is contended on behalf of the Employer that as all of the claims filed by the Claimant were required to be merged with his earliest claim subject to review under Part 727, it should be dismissed as the operator responsible for payment of the benefits awarded in this case as provided by §205(a)(1) of the 1981 Act amendments.

I disagree. The procedural history of this case was set forth in detail in my original Decision and Order and need not be repeated. The claim subject to review pursuant to §435 of the Act, as amended in 1977, was denied on reconsideration in March 1981. As the Claimant took no further action until he filed a new claim on April 29, 1983, the original claim became finally denied and none of his subsequent claims merged with the earlier claim. *See Tonelli v. Director, OWCP,* 878 F.2d 1083 (8th Cir. 1989); *West v. Director, OWCP,* 896 F.2d 308 (8th Cir. 1990). Consequently, the award of benefits in this case was not based on a review pursuant to §435 of the Reform Act and the transfer provisions of the 1981 amendments do not apply.

ORDER

The Employer's motion for reconsideration/modification is denied as it is not entitled to dismissal as the responsible operator in this case.

/s/ Joel R. Williams
JOEL R. WILLIAMS
Administrative Law Judge

U.S. Department of Labor [SEAL]
Office of Administrative Law Judge
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:	
WESLEY HARVEY, Claimant,	Case No. 91-BLA-1132 OWCP No. 482-09-8645
vs.	
LOVILLIA COAL CO., Respondent	
and	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party in Interest	

I. John Rossi, Esq.
For the Claimant

James Q. Blomgren, Esq.
For the Employer

Dewey P. Sloan, Jr., Esq.
For the Party In Interest

BEFORE: JOEL R. WILLIAMS
Administrative Law Judge

DECISION AND ORDER-AWARDING BENEFITS

This proceeding arises out of a request for modification under Title IV of the Federal Coal Mine Health and

Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* and its implementing regulations. Benefits under the Act are provided to persons who are totally disabled due to pneumoconiosis, commonly known as black lung.

Procedural History

This case has the following procedural history:

June 14, 1973 – The Claimant, filed a claim for Part B benefits with the Social Security Administration (SSA).

January 22, 1974 – The claim was denied by SSA.

January 27, 1976 – The claim was reconsidered and denied by SSA.

August 26, 1976 – The claim was denied by a SSA administrative law judge following a request for hearing.

February 29, 1980 – The claim was reviewed by the Department of Labor (DOL) pursuant to the 1977 amendments and denied.

March 27, 1981 – The claim was reconsidered by DOL and again denied.

April 29, 1983 – A new claim was filed with DOL.

September 12, 1983 – The April 29, 1983 claim was denied by DOL.

October 31, 1984 – A new claim was filed with DOL.

December 12, 1984 – The October 31, 1984 claim was denied by DOL.

June 27, 1987 – A new claim was filed with DOL.

December 3, 1987 – The June 27, 1987 claim was denied by DOL.

March 1, 1990 – A new claim was filed with DOL.

May 11, 1990 – The District Director (formerly, Deputy Commissioner) issued a "Proposed Decision and Order of No Material Change in Condition and Denial of Claim."

October 23, 1990 – The Claimant requested modification of the May 11, 1990 action.

October 25, 1990 – The modification request was denied.

November 2, 1990 – The Claimant requested his first formal hearing before a DOL Administrative Law Judge.

November 19, 1990 – I. John Rossi, Esquire, is appointed Claimant's representative.

November 21, 1991 – An Informal Conference was held.

December 20, 1991 – An "Interim Memorandum of Conference" is issued.

January 15, 1991 – The Claimant, by counsel, renews his request for a hearing.

October 21, 1992 – A hearing was held before the undersigned in West Des Moines, Iowa, at which time the parties were afforded full opportunity to present evidence and arguments.

Findings and Conclusions

1. Material Change In Condition/Mistake of Fact

As the Claimant did not timely request a hearing following the DOL denials of the claims filed prior to March 1, 1990, the claim filed on that date was subject to the provisions of §725.209(c). Accordingly, the March 1, 1990 claim was subject to denial on the basis of the denials of the prior claims unless the Claimant established that he had undergone a material change in conditions. The Claimant did not timely request a hearing from the initial denial of the March 1, 1990 but he did request a modification of this denial within one year. Therefore, he must further prove that there was a mistake of fact involved in the May 11, 1990 proposed decision and order or that he has undergone a material change in conditions since that date.

In *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), the Benefits Review Board defined a "material change in conditions" as that evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result. The Board's interpretation of "material change in conditions" was rejected subsequently by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director*, OWCP 946 F.2d 554 (1991). However, in *Shupink v. LTV Company* 17 BLR 1-24, (October 2, 1992) the Board stated that in cases arising outside the Seventh Circuit,

> "[It would] continue to hold that in duplicate claims, the administrative law judge must

> consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. When considering a duplicate claim on the merits, the administrative law judge must consider and weigh the evidence filed with both the prior claim and the new claim.

Any judicial review of the instant claim will come under the jurisdiction of the United States Court of Appeals for the Eighth Circuit as the Claimant's last exposure to coal mine dust was while he worked as a miner in the State of Iowa. Consequently, I am bound to apply the Board's holding in *Shupink* to this case.

At the hearing in this case, the Claimant submitted copies of the records of his hospitalizations at the Knoxville Area Community Hospital which included five admissions from November 1990 to November 1991 for treatment of respiratory problems. The discharge summary for the most recent of these hospitalizations, i.e., from November 18 to November 22, 1991, includes a diagnosis of Black Lung disease. He has submitted also a statement from his treating physician, Dr. Gordon M. Arnott, which is to the effect that the Claimant is disabled by his breathing problems. As this new evidence, if fully,

credited, could establish that the claimant is totally disabled by pneumoconiosis, I conclude that a material change in conditions has been demonstrated in accordance with the *Spese* test. Accordingly, I will proceed to weigh this evidence against all of the other evidence of record to determine whether the Claimant is entitled to benefits. In so doing, I will apply the criteria set forth in Part 718 of the regulations.

2. Existence of Pneumoconiosis

Pursuant to those provisions of §718.202 of the regulations applicable to the present case, the existence of pneumoconiosis may be established by a chest x-ray, conducted and classified in accordance with §718.102; a biopsy; or a reasoned medical opinion, based on objective medical evidence and sound medical judgement, which is to the effect that the miner suffers from pneumoconiosis. Section 718.201 of the regulations defines "pneumoconiosis" as a chronic dust disease of the lung and its sequelae including any chronic pulmonary disease resulting in pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

The record includes two interpretations each, including at least one "B" reading, of x-rays taken in connection with Department of Labor evaluations of the Claimant in 1979, 1983, 1984, 1987, and 1990. All of these are negative for the existence of pneumoconiosis. The latest two x-rays of record were taken during the Claimant's hospitalizations in September 1991 and November 1991 and were

interpreted as showing some chronic obstructive pulmonary disease.

The record does include a statement, dated September 1, 1977, from Dr. D. A. Mather that chest x-ray films of the Claimant demonstrate moderate pneumoconiosis and severe fibrosis, and a statement from Dr. Arnott, dated February 17, 1992, that the Claimant has the x-ray findings of Black Lung Disease. An X-ray dated August 31, 1977, the day before Dr. Mather's report, has been interpreted as negative by a "B" reader. Dr. Arnott does not identify the date of the x-ray to which he referred. In any event, neither Dr. Mather nor Dr. Arnott have classified their x-ray findings in accordance with one of the classification systems required by §718.102. Accordingly, I find that the x-ray evidence fails to establish the existence of pneumoconiosis.

There is no biopsy evidence of record in the case. The record establish[es] that the Claimant had in excess of 25 years of coal mine employment ending in 1975. He has given histories of having smoked one pack of cigarettes a day for between 20 and 36 years, ending in 1960. He has undergone pulmonary evaluations, ordered by the Department of Labor, by Dr. Paul C. Todd in 1979, by Dr. Roger Liu in 1983, by Dr. Alda Knight in 1984, by Dr. R. D. Des Camps in 1987 and by Dr. B. C. Hellyer in 1990. Dr. Todd and Dr. Lui diagnosed only hypertension. Dr. Knight diagnosed mild to minimal chronic obstructive pulmonary disease and indicated that it was caused by coal mine employment because "occupational exposure is present." Dr. Des Camps diagnosed mild obstructive lung disease and indicated that it was not related to coal mine

employment because the chest x-ray was negative. However, he was asked on September 18, 1987 to review his findings in light of the regulatory definition of pneumoconiosis and to state whether the Claimant's pulmonary condition meets this definition. He responded on September 15, 1987 that the condition was probably caused by a combination of factors one being coal mine exposure and the other being cigarette smoking. Dr. Hillyer also diagnosed chronic obstructive pulmonary disease but opined that it was caused only by cigarette smoking.

The records from the Knoxville Area Community Hospital show that the Claimant's primary complaints on his admissions prior to November 18, 1991, related to difficulty in breathing. The diagnoses entered by Dr. Arnott upon the Claimant's discharge from the hospital at these times were acute and/or chronic emphysema, asthma, bronchitis and/or chronic obstructive lung disease. When he was admitted to the hospital on November 18, 1991, his complaints included gastrointestimonal problems as well as difficulty breathing. In the "Past History" recorded at that time, Dr. Arnott noted that the Claimant had worked in a coal mine for a number of years and had a long history of Black Lung disease with emphysema. Black Lung disease was included in the discharge diagnoses. The report previously mentioned from Dr. Arnott is dated February 17, 1992 and states:

> This man worked in coal mines for 32 years. During the last four years, he had considerable trouble with breathing. He has the x-ray findings of Black Lung Disease.

> Mr. Harvey requires breathing treatments, medication to dilate his lungs, inhaler treatments and cortisone injections to help him with his breathing. He has been in the hospital with this condition on numerous occasions.
>
> He will continue to be disabled by his problem.

We have here a conflict in the medical evidence as to the etiology of the Claimant's respiratory impairment. Dr. Knight attributes it to his coal mine employment, Dr. Des Camps attributes it to a combination of coal mine employment and coal mine employment and Dr. Hillyer attributes it to only cigarette smoking. Thus, it may be said that as to these three physicians, the evidence as to the cause of the Claimant's respiratory impairment is evenly divided. Based on these opinions alone, the Claimant has not met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). However, if you credit Dr. Arnott's opinion, the scale is tipped in favor of finding that the Claimant suffers from pneumoconiosis as defined in the regulations.

I indicated previously that there is no documentation to support Dr. Arnott's statement that the Claimant has x-ray findings of pneumoconiosis. Nevertheless, he has been the Claimant's treating physician for several years. He has hospitalized and examined him on a number of ocassions [sic] and was aware of his substantial period of coal mine employment. Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions. *Justus v. Director*,

OWCP 6 BLR 1-1127 (1984). Furthermore, as he has been the Claimant's treating physician on a rather frequent and intensive basis, I afford his opinion considerable weight. See *Wilson v. U.S. Steel Corp.* 6 BLR 1-1055 (1984). I find, therefore, that the Claimant has established the existence of pneumoconiosis.

3. Etiology of Pneumoconiosis

As the Claimant has more than ten years of coal mine employment, it is presumed, in the absence of evidence to the contrary, that his pneumoconiosis arose out of his coal mine employment. §718.203(b). There is no contrary evidence in this case sufficient to rebut this presumption.

4. Total Disability

Pursuant to §718.204(c) total disability may be established by a pulmonary function tests [sic] which meets the standards set forth in Appendix B to Part 718, Arterial blood tests which meet the standards in Appendix C, a showing that the miner has cor pulmonale with right sided congestive heart failure or a physician's reasoned and documented conclusion that a miner's respiratory or pulmonary condition prevents him from doing his regular coal mine or comparable work.

None of the pulmonary function studies of record in this case, i.e., those done in August 1973, September 1979, June and August 1983, November 1984, July and September 1987 and March 1990, produced qualifying FEV_1 results for the Claimant's height and then age. A resting blood gas study done in June 1983 produced qualifying

results. However, the exercise study done at that time was non qualifying as well as were all subsequent studies, i.e. those done in 1984, 1987, 1990 and as recent as August 1991. Consequently, I find that the preponderance of the blood gas study evidence fails to establish total disability. A diagnosis of cor pulmonale is not included in the record.

None of the physicians who have examined the Claimant on behalf of the Department of Labor have considered him to be disabled from a pulmonary or respiratory standpoint. On the other hand Dr. Arnott has opined that the Claimant will continue to be disabled by his respiratory problems. The last Department of Labor examination took place in March 1990. The Claimant's hospital records dramatically demonstrate that the Claimant's respiratory status has worsened substantially since then. These records ambly [sic] document Dr. Arnott's opinion. I find that the deterioration in his condition to the point of total disability began with the acute episode in October 1990. Consequently, I conclude that he had been totally disabled from a pulmonary or respiratory impairment since October 1990.

5. Cause of Total Disability

The Claimant has been diagnosed as having a combination of respiratory impairment, i.e., emphysema, asthma, bronchitis, chronic obstructive pulmonary disease and Black Lung disease. However, in order to be entitled to benefits under the Act, pneumoconiosis need not be the sole cause of his respiratory disability but need only be a contributing cause. *Scott v. Mason Coal Company,*

14 BLR 1-37 (1990). Dr. Knight and Dr. Des Camps both have opined that coal mine employment was as least a contributing cause for the chronic obstructive pulmonary disease and Dr. Arnott has indicated that the Claimant's disability is caused by Black Lung disease. These three opinions outweigh that of Dr. Hillyer. Accordingly, I conclude that pneumoconiosis is a contributing cause of the Claimant's pulmonary or respiratory disability.

6. Augmentation

The Claimant has one dependent for the purpose of augmentation of his benefits, his wife, Jessie.

7. Effective Date

As I have found that the Claimant's condition changed in October 1990 to the point that he became totally disabled at that time, his benefits will be made effective from October 1, 1990.

ORDER

The Employer is Ordered to pay the Claimant benefits under the Act, augmented by one dependent, effective from October 1, 1990 and to furnish the Claimant with medical care for his pneumoconiosis as provided in the Act and regulations.

/s/ Joel R. Williams
JOEL R. WILLIAMS
Administrative Law Judge

U.S. Department of Labor LOGO

EMPLOYMENT STANDARDS ADMINISTRATION
DIVISION OF COAL MINE WORKERS' COMPENSATION
DRAWER 3515 F.O.B., 1961 STOUT STREET
DENVER, COLORADO 80294
(303) 844-3244

In the Matter of the Claim for Benefits Under the Black Lung Benefits Act	:	**PROPOSED DECISION AND ORDER OF NO MATERIAL CHANGE IN CONDITION AND DENIAL OF CLAIM**
Wesley Harvey Claimant	:	
v.	:	**CLAIM NO: LA 482-09-8645 LM**
Lovilia Coal Company Employer/Carrier or Director	:	

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Pursuant to 20 CFR 725.309 (c), (d), 725.418, and having reviewed the new claim and the documentary and other evidence of record relevant to it, the Deputy Commissioner issues this proposed decision and order of no material change in condition and denial of benefits.

FINDINGS OF FACT

1. Claimant filed a duplicate claim under the Black Lung Benefits Act, 30 USC 901 et seq, on February 13, 1990.

2. The claimant's original Part B benefit application was filed on June 14, 1973. He filed an election on the Part B claim on April 1, 1978, and this application was finally denied on February 29, 1980. Claimant filed a duplicate claim on April 29, 1983 which was finally denied on September 12, 1983. Subsequently the claimant filed a request for modification of the September 12, 1983 denial on October 26, 1984. The request for modification was denied December 12, 1984. Claimant filed another duplicate claim on June 26, 1987 which was finally denied on December 3, 1987.

3. Since the new claim was filed more than one year after the denial of the previous claim, the later claim is not a request for modification and the requirements of 20 CFR 725.310 are not met.

4. Claimant has failed to establish a material change in condition. He has failed to establish at least one of the following required elements of entitlement pursuant to the entitlement criteria in effect at the time the claim was filed, 20 CFR Part 718.

   X a. PNEUMOCONIOSIS. The miner has pneumoconiosis as defined by the Act and the regulations.

   X b. CAUSAL RELATIONSHIP. The miner's pneumoconiosis arose out of coal mine employment.

   X c. TOTAL DISABILITY. The miner is totally disabled.

   X d. CAUSATION. The miner's disability is due to pneumoconiosis.

5. The deputy commissioner bases his finding of no material change in condition on the following evidence of record which he finds credible and therefore determinative of the issue presented:

TYPE OF EVIDENCE	DOCTOR	DATE
X-ray	Rafferty	3/15/90
Rereading of x-ray dated 3/15/90	Sargent	4/4/90
Ventilatory study	Hillyer	3/15/90
Arterial blood gas study (resting and exercise)	Hillyer	3/15/90
Physial [sic]	Hillyer	4/6/90

6. Thus, there has been no material change in condition and this duplicate claim must be denied.

7. Review of the medical evidence of record also establishes that claimant has failed to establish total disability or death due to pneumoconiosis arising out of coal mine employment.

ORDER

In accordance with 20 CFR 725.309 (c), (d), 725.418, the deputy commissioner finds that there has been no material change in claimant's condition, that claimant has failed to establish total disability or death due to pneumoconiosis arising out of coal mine employment and that this claim must therefore be denied.

If you disagree with this determination you may pursue your claim further if you:

(1) SUBMIT ADDITIONAL EVIDENCE

You may refer to the enclosed "Guide for Submitting Additional Evidence (CM-1000g)" on which we have checked the items that will be helpful in pursuing your claim. You must send the evidence to us *within 60 days* of the date of this letter. If you need more time, you must request approval from this office.

OR

(2) REQUEST A HEARING ON YOUR CLAIM

Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request *within 60 days* of the date of this letter unless you notify us that you intend to submit additional evidence.

If you intend to pursue your claim, you may wish to obtain a representative in order to be sure that your rights are fully protected. We will furnish copies of all the evidence in your claim to you or any representative you choose. If you obtain a representative, you must complete the enclosed authorization (CM-1078) and return it to this office.

NOTE: If you do not take any action within 60 days, you [sic] claim will be considered abandoned and the denial will become final. However, you have the right to ask for reconsideration of your claim if you write to this office within one year from the date the denial becomes final, but *only* if your condition has changed, or a mistake was

made when your claim was denied. If you request reconsideration, you *must* submit proof to support your request.

Signed at Denver, Colorado on 5-11-90 .

/s/ John C. Martin
JOHN C. MARTIN
Deputy Commissioner

Enclosure(s): CM-998
CM-1000g
CM-1078

cc: Lovilia Coal Company
c/o Bituminous Casualty Corporation

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation
P.O. Box 25346
Denver, CO 80225

DEC 03 1987

Claim Number: LA 482-09-8645 [LOGO]

Wesley R. Harvey
417 3rd St. Place
Knoxville, Iowa 50138

Dear Claimant:

We have carefully reviewed the evidence in your claim under the Black Lung Benefits Act. This evidence does not show that you qualify for black lung benefits. Your claim is therefore denied.

To qualify for black lung benefits, you must show that:

1. You have pneumoconiosis (black lung disease); *and*
2. the disease was caused at least in part by your coal mine work; *and*
3. the disease has caused total disability.

You must meet *all three* of the above conditions to qualify for black lung benefits.

You do not qualify for benefits because the evidence in your claim

1. (X) does not show that you have pneumoconiosis (black lung disease);

2. (X) does not show that the disease was caused at least in part by coal mine work;

3. (X) does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

12 DEC 1984

LM3 482-09-8645 [LOGO]

Wesley R. Harvey
417 3rd St. Place
Knoxville, Iowa 50138

Dear Claimant:

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You do not qualify for benefits because the evidence in your claim

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2. (X) does not show that the disease was caused at least in part by coal mine work;

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DIRECTORS EXP. NO. 23
CONSISTING OF 32 PAGES

If you disagree with this determination you may pursue your claim further if you:

(1) SUBMIT ADDITIONAL EVIDENCE

You may refer to the enclosed "Guide for Submitting Additional Evidence (CM-1000)" on which we have checked the items that will be helpful in pursuing your claim. You must send the evidence to us within 60 days of the date of this letter. If you need more time, you must request approval from this office.

OR

(2) REQUEST A HEARING ON YOUR CLAIM

Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request within 60 days of the date of this letter unless you notify us that you intend to submit additional evidence.

If you intend to pursue your claim, you may wish to obtain a representative in order to be sure that your rights are fully protected. We will furnish copies of all the evidence in your claim to you or any representative you choose. If you obtain a representative, you must complete the enclosed authorization (CM-1078) and return it to this office.

NOTE: If you do not take any action within 60 days, your claim will be considered abandoned and the denial will become final. However, you have the right to ask for reconsideration of your claim if you write to this office within one year from the date the denial becomes final, but *only* if your condition has changed, or a mistake was made when your claim was denied. If you request reconsideration, you *must* submit proof to support your request.

Sincerely,

/s/ Illegible
Claims Examiner

Enclosure(s):

cc: Mr. Blomgren
Lovilia Coal Co.
Bituminous Casualty Corp.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
DIVISION OF COAL MINE WORKERS' COMPENSATION
BOX 25346
DENVER, COLORADO 80225
(303) 234-6243

SEP 12 1983

RM 482-09-8645 [LOGO]

Wesley R. Harvey
417 3rd St. Place
Knoxville, Iowa 50138

Dear Claimant:

We have carefully reviewed the evidence in your claim under the Black Lung Benefits Act. This evidence does not show that you qualify for Black Lung benefits. Your claim is therefore denied.

To qualify for black lung benefits, you must show that:

1. You have pneumoconiosis (black lung disease); *and*
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2. (X) does not show that the disease was caused at least in part by coal mine work;

3. (X) does not show that you are totally disabled by the disease.

Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation
(814) 533-4309

Johnstown, PA 15901

27 MAR 1981

Claim Number: **4JO 482-09-8645** [LOGO]

Wesley R. Harvey
417 East 3
Knoxville, IA 50138

Dear Claimant:

Further reference is made regarding your claim for black lung benefits under the Federal Coal Mine Safety and Health Act of 1977, as amended.

The additional information and evidence submitted following our initial finding dated **02-29-80** has been carefully considered. Our initial finding that you cannot be found entitled to benefits for the reason(s) previously given remains unchanged by the additional evidence and information.

If you disagree with this finding, you may write to us and ask that your claim be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. If you want a hearing, you must make your request within 60 days of the date of this letter.

Based on the above, we are administratively closing your case at this time. However, you may ask for reconsideration of your claim if you write to this office within (1) one

year from the date of our initial finding (see above), but only if your condition has changed or a mistake was made when your claim was denied. If you request reconsideration, you must submit evidence to support your request.

Sincerely,

/s/ Betty White
BETTY WHITE
Claims Examiner

cc: **Leo N. Bradley, Esquire**

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation
(814) 533-4368

Johnstown, PA 15901

FEB 29 1980

Claim #9JO-482-09-8645 [LOGO]

Mr. Wesley Harvey
417 East 3
Knoxville, IA 50138

Dear Claimant:

We have carefully reviewed the evidence in your claim under the Black Lung Benefits Reform Act of 1977. This evidence does not show that you qualify for Black Lung benefits. Your claim is therefore denied.

To qualify for black lung benefits, you must show that:

1. You have pneumoconiosis (black lung disease); *and*

2. the disease was caused at least in part by your coal mine work; *and*

3. the disease has caused total disability.

You must meet *all three* of the above conditions to qualify for black lung benefits.

You do not qualify for benefits because the evidence in your claim

1. (X) does not show that you have pneumoconiosis (black lung disease);

2. (X) does not show that the disease was caused at least in part by coal mine work;

3. (X) does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

If you disagree with this determination you may further pursue your claim if you:

(1) SUBMIT ADDITIONAL EVIDENCE

You may refer to the enclosed "Guide for Submitting Additional Evidence (CM-1000b)" on which we have checked the items that will be helpful in pursuing your claim. You must send the evidence to us within 60 days of the date of this letter. If you need more time, you must request approval from this office.

OR

(2) REQUEST A HEARING ON YOUR CLAIM

Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request within 60 days of the date of this letter unless you notify us that you intend to submit additional evidence.

If you intend to pursue your claim, you may wish to obtain a representative in order to be sure that your rights are fully protected. We will furnish copies of all the evidence in your claim to any representative you choose. If you obtain a representative, you must complete the enclosed authorization (CM-1078) and return it to this office.

If you do not take any action within 60 days, your claim will be considered abandoned.

Sincerely,

/s/ Phil Mulhollen
Phil Mulhollen
Claims Examiner

Enclosure(s) 1000a, 1000b, 998

NOTE: You have the right to ask for reconsideration of your claim if you write to this office within one year from the date of this letter, but *only* if your condition has changed, or a mistake was made when your claim was denied. If you request reconsideration, you *must* submit proof to support your request.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of	)	**Claim for**
Wesley Harvey	)	Black Lung Benefits
(Claimant)	)	
	)	482 09 8645
	)	(Social Security Number)
(Wage Earner)	)	
(Leave blank if same as above)	)	

This case is before the Administrative Law Judge following a request for hearing.

ISSUES

The general issue to be decided is whether the claimant is entitled to miner's benefits under title IV, section 412(a) of the Federal Coal Mine Health and Safety Act of 1969, as amended. The specific issues are: (1) whether the claimant is totally disabled within the meaning of the Act; (2) whether such disability was the result of coal mine employment; (3) whether the claimant has filed a claim for workmen's compensation under State law (where applicable); and (4) when his black lung benefits, if any, begin.

APPLICABLE LAW AND REGULATIONS

Title IV of the Federal Coal Mine Health and Safety Act of 1969 as amended, provides for entitlement to black lung benefits. Subpart B, section 411(a) thereof, provides that the Secretary of Health, Education and Welfare shall "make payments of benefits in respect of total disability of any miner due to pneumoconiosis."

The Federal Coal Mine Health and Safety Act, as amended, provides that the Social Security Administration has the responsibility for administering the black lung benefits program for miners' claims filed through June 30, 1973; Thereafter, jurisdiction passes to the Department of Labor. A live miner must file a valid application prior to July 1, 1973, and must also establish that he was totally disabled prior to that date.

The Act defines "pneumoconiosis" as a chronic dust disease of the lungs arising out of employment in a coal mine.

Section 411(c)(4) of the Act provides that if evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, it may, in the absence of evidence to the contrary, be presumed that a miner is totally disabled due to pneumoconiosis if he was employed for 15 years or more in underground coal mining or surface mining under substantially similar conditions. In this regard, Social Security Administration Regulation 410.414(b)(4) provides: "However, where the evidence shows a work history reflecting many years of such coal mine employment (although less than 15), as well as a severe lung impairment, such evidence may be

considered, in the exercise of sound judgment, to establish entitlement in such case. . . . "

Section 411(b) also provides, in pertinent part, that the "Secretary shall by regulation prescribe standards for determining . . . whether a miner is totally disabled due to pneumoconiosis." In this regard, Subpart D of Regulations No. 10 contains the various provisions implementing this directive of the Act.

EVIDENCE CONSIDERED

In his application for black lung benefits, in response to the question "What is your disability," the claimant replied, "I do not know. I am filing to find out." At the time of filing, he was working as a general repairman for a coal company and earning over $200 a week (Exhibit 1).

A chest x-ray taken on August 10, 1973, showed the claimant's lungs to be clear and well aerated. The results of pulmonary function studies taken on the same date exceeded the interim regulatory requirements for any presumption of total disability due to pneumoconiosis (Exhibit 11). These studies were repeated on September 19, 1973, and the results again exceeded the regulatory requirements (Exhibit 14). Arterial blood gas studies, an exercise test, and electrocardiograms taken on October 9, 1973, were all essentially normal (Exhibit 15).

From the above, it can be seen that the claimant has adequate pulmonary function and cannot be considered totally disabled due to pneumoconiosis.

FINDINGS

The administrative Law Judge makes the following specific findings:

1. The claimant has in excess of 15 years of coal mining employment.

2. The credible evidence, including x-ray, pulmonary function studies, blood gas studies, and other relevant evidence of record, does not demonstrate significantly impaired lung function as a result of a chronic respiratory or pulmonary condition.

3. The preponderance of the medical and other relevant evidence does not demonstrate that the claimant is totally disabled as a result of pneumoconiosis. Neither does such evidence demonstrate a totally disabling chronic respiratory or pulmonary impairment which could give rise to the presumption of total disability due to pneumoconiosis.

4. It would be futile for the claimant to file for workmen's compensation under applicable State law.

DECISION

WHEREFORE, it is the decision of the Administrative Law Judge that the claimant, based on the application filed on June 14, 1973, is not entitled to black lung benefits based on total disability under title IV, sections 411 and 412(a) of the Federal Coal Mine Health and Safety Act of 1969, as amended.

Date: August 26, 1976

/s/ Glenn C. Parmelee
Glenn C. Parmelee
Administrative
Law Judge B

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21241

BUREAU OF
DISABILITY INSURANCE

REFER TO:
IDI-575-T
482-09-8645

NOTICE OF PROPOSED
RECONSIDERED DETERMINATION
(1972) AMENDMENTS

Mr. Wesley Harvey
417 Third Street Place
Knoxville, Iowa 50138

Dear Mr. Harvey:

Your claim for black lung benefits has been carefully reexamined under the provisions of the Federal Coal Mine Health and Safety Act, as amended in 1972 (see leaflet enclosed) and we still find that you are not eligible for benefits. This proposed denial will become effective on Apr. 5, 1976. The reason for the denial, along with a description of the evidence on which it is based, is provided in the attached statement.

If you do not agree with our determination or if you have any questions about the proposed denial, you should get in touch with any social security office. The people there will be glad to explain further the reason for our denial and answer any questions you may have. You are also entitled to review the evidence used in deciding your

case. Please have this notice nearby if you telephone or take it with you if you visit the social security office.

If you feel that the proposed denial is not correct, you may take either one of the following steps:

(1) You may request a hearing on your claim by an administrative law judge of the Bureau of Hearings and Appeals. Such a request may be made at any time but not later than 6 months after the date shown in the first paragraph of this notice. The people in your local social security office will help you with this request.

(2) If you believe there is more evidence or questions relating to your claim that should be considered before a hearing, you may ask that such evidence be reviewed by the Bureau of Disability Insurance. The people in your local social security office will help you to request this review and to obtain the

* * *

As part of the reconsideration process, all the evidence in your case was reexamined by a special staff different from the one which initially reviewed your claim. The evidence in your case includes a chest X-ray, the results of special breathing tests, a report of a physical examination, and information from a test done after exercise at Mercy Hospital on October 9, 1973. Also considered were your statement and statements from people who know you that you recently submitted.

This evidence does not show you have complicated pneumoconiosis or a disabling lung condition. Accordingly, on the basis of all of the evidence in your file it has been

determined that you do not meet the requirements of the law for entitlement to benefits. Therefore, it is necessary to again deny your claim.

[SEAL]

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21241

NOTICE OF DETERMINATION ON CLAIM FOR BENEFITS UNDER THE FEDERAL COAL MINE HEALTH AND SAFETY ACT, AS AMENDED

Name and Address of Claimant	Social Security Number
Mr Wesley Harvey 417 3 St Pl Knoxville IA 50138	482-09-8645 LM

THE DECISION

Your claim for black lung benefits has been reviewed under the provisions of the Federal Coal Mine Health and Safety Act, as amended in 1972, and is denied because the evidence does not show that you meet the requirements of the law. AN EXPLANATION OF WHY YOUR CLAIM WAS DENIED IS PROVIDED ON THE SEPARATE SHEET ATTACHED TO THIS LETTER.

THE REQUIREMENTS

You must be severely disabled due to pneumoconiosis (or a chronic lung impairment that may be presumed to be due to pneumoconiosis) arising out of employment as a miner in the Nation's coal mines. Under the law, you are considered disabled when pneumoconiosis either has advanced to the stage commonly referred to as "complicated pneumoconiosis" or prevents you from engaging in

coal mine work or in other gainful work comparable to work which you did with some regularity and over a substantial period of time in a coal mine.

YOUR RIGHT TO QUESTION THE DECISION

If you have any questions about your claim, call or visit any social security office. The people there will explain the requirements of the law, tell you which requirements you did not meet, and discuss the evidence considered in reaching the decision on your claim. You are entitled to this information. YOU ARE ALSO ENTITLED TO REVIEW THE EVIDENCE USED IN DECIDING YOUR CASE. If you phone, please have this notice nearby so you may refer to it. Please take it with you if you visit the office.

If you think the decision on your claim is wrong, you may ask that it be reconsidered. You must make your request in writing no later than six months from the date of this notice. You may make your request through any social security office.

Please see the other side of this letter for more information.

Date Jan. 22, 1974

ISSUED BY: Bureau of Disability Insurance
Division of Initial Claims

AUTHORITY: Federal Coal Mine Health and Safety Act, as amended, Subpart D of Regulations No. 10 of the Social Security Administration (20 CFR Part 410)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4122

Lovilia Coal Company, et al.,	*	
Petitioners,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
Wesley Harvey, et al.,	*	Rehearing
Respondents.	*	En Banc
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 1, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

5 U.S.C. § 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Notice of claim

Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other that the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days'

notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a

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[1] So in original. Probably should be "an".

copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the

hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while

serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement or orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

20 C.F.R. § 725.309

§725.309 Duplicate claims.

(a) A Claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.701A.

(b) A claimant who has filed a claim for benefits under both parts B and C of title IV of the Act or who has filed more than one claim for benefits under part C of title IV of the Act before March 1, 1978, and whose claims are pending or have been denied (§ 727.102 of this subchapter) shall have his or her claims considered in accordance with § 727.103 of this subchapter.

(c) A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act before March 1, 1978, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under part 727 of this subchapter. If an earlier claim subject to review under part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later

claim is a request for modification and the requirements of § 725.310 are met.

(d) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter, a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In a case involving duplicate claims, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart G of this part.

Supreme Court, U.S.
FILED
MAR 10 1998
CLERK

(2)

No. 97-918

In the Supreme Court of the United States

OCTOBER TERM, 1997

LOVILIA COAL COMPANY, ET AL., PETITIONERS

v.

WESLEY HARVEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
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MARVIN KRISLOV
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23 pp

QUESTIONS PRESENTED

Whether the Director of the Office of Workers' Compensation Programs has permissibly interpreted the "material change in conditions" standard of 20 C.F.R. 725.309(d), as presently in effect, to permit consideration of a successive claim for black lung benefits if a coal miner can show that evidence relating to a period after the denial of a previous claim now establishes the existence of an element that (i) is necessary to prove entitlement to benefits and (ii) was adjudicated against the miner in the previous proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 109 F.3d 445. The decisions and orders of the Benefits Review Board (Pet. App. 26-33, 40-53) and the administrative law judge (Pet. App. 34-39, 54-55, 56-67) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1997. A petition for rehearing was denied on August 1, 1997. Pet. App. 95. On October 27, 1997, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 1, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners "who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). In order to establish entitlement to benefits, a miner must prove (1) that he has pneumoconiosis, (2) that it arose out of coal mine employment, and (3) that he is totally disabled due to the disease. See 20 C.F.R. 718.202-718.204; see also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). Pursuant to her broad authority under the Act, 30 U.S.C. 932(a) and 936(a), the Secretary of Labor has promulgated regulations governing the filing and adjudication of claims for such benefits. See 20 C.F.R. 725.301-725.422.

This case involves the Secretary's regulation governing "duplicate" claims—*i.e.*, any claim filed after the claimant's first application for benefits under the BLBA. 20 C.F.R. 725.309 (reprinted at Pet. App. 105-107). If the first application is still pending, the later claim "merge[s]" into it. 20 C.F.R. 725.309(d). If the original claim was finally denied less than one year before the later claim is filed, the later claim may be treated as a request for modification of the decision denying benefits. *Ibid.*[1] If, however, a subsequent claim is filed more than a year after final denial of the first application, the regulations provide that "the later claim shall also be denied, on the grounds of the

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[1] Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 922, as incorporated in the BLBA, 30 U.S.C. 932(a), permits a request for modification, up to one year after a denial of benefits, "on the ground of a change in conditions or because of a mistake in a determination of fact." See 20 C.F.R. 725.310.

prior denial, unless the [district director] determines that there has been a material change in conditions." *Ibid.*

2. Respondent Wesley Harvey worked in coal mines from 1930 until 1975. Pet. App. 1.[2] For the last ten years he worked for petitioner Lovilia Coal Company, which is therefore responsible for any liability on the present claim. *Ibid.*; 20 C.F.R. 725.493(a)(1).

Respondent filed his first claim for benefits under the BLBA in 1973. Pet. App. 1-2. After an initial denial, that claim was reopened under statutory authorization, but again denied. *Id.* at 2. Claims filed in 1983, 1984 and 1987 were similarly denied by the Department of Labor's Office of Workers' Compensation Programs (OWCP), on the ground that respondent had failed to establish any of the elements necessary to show an entitlement to benefits. *Id.* at 2, 57-58.

Respondent filed his present claim in 1990. The OWCP at first denied the claim on the ground that respondent had not demonstrated a "material change in conditions," as required by 20 C.F.R. 725.309(d) where a previous claim filed by the same claimant has been denied. Pet. App. 68-72. An administrative law judge (ALJ), however, overturned that decision. Applying the standard adopted by the Department's Benefits Review Board (BRB) in *Spese* v. *Peabody Coal Co.*, 11 Black Lung Rep. (MB) 1-174 (1988), the ALJ first determined that respondent's new medical reports, if credited, "could establish" that he was totally disabled by pneumoconiosis, and thus that he

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[2] On January 22, 1998, respondent's counsel notified the Court that respondent died on October 28, 1997. See page 8, *infra*.

had demonstrated a material change in conditions. Pet. App. 60-61. On the merits, the ALJ concluded that the evidence sufficiently established that respondent suffered from pneumoconiosis arising out of coal mine employment, that his physical condition had worsened to the point of total disability, and that the pneumoconiosis was a contributing cause of his disability. *Id.* at 61-67. The ALJ therefore ordered the payment of benefits commencing as of October 1, 1990.[3]

The Benefits Review Board vacated the ALJ's decision and remanded the claim for further consideration. Pet. App. 40-53. The Board agreed that respondent had established a material change in conditions under the *Spese* standard (*id.* at 46), and it upheld the ALJ's finding that he had pneumoconiosis (*id.* at 46-48). The Board also held that there was sufficient evidence to support a finding of total disability (*id.* at 48), but it concluded that the ALJ had failed to consider contrary evidence on that question, that there was insufficient evidence to support the ALJ's determination concerning when respondent became disabled, and that the ALJ should reconsider certain

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[3] In a request for reconsideration, Lovilia argued that any liability for benefits should be borne by the Black Lung Disability Trust Fund under 30 U.S.C. 932(c) and (j)(3), which provide for the transfer of liability on claims that were initially denied before March 1, 1978, but were later approved after the special review authorized by 30 U.S.C. 945. The ALJ held that those provisions did not apply to this case because Harvey's pre-1978 claim had been finally denied after review under Section 945. Pet. App. 54-55. The BRB and the court of appeals affirmed that holding (*id.* at 4-7, 43-44), and petitioners do not renew their argument on that point in this Court.

evidence concerning the cause of disability. *Id.* at 49-52.

On remand, the ALJ again awarded benefits. Pet. App. 34-39. The ALJ concluded that although the early medical reports in the record did not support a finding of total disability due to pneumoconiosis, later reports "reveal[ed] the progression of the disease to the point where it caused [respondent] to be totally disabled." *Id.* at 37. The ALJ explained that he placed greater weight on the opinion of the treating physician than on the contrary evidence, and noted that he had "rarely * * * seen a treating physician's opinion so well documented by records" of recent hospitalizations due to respiratory disease. *Ibid.* The ALJ further concluded that, although there were conflicting medical opinions on the point, the preponderance of the evidence supported the conclusion that Harvey's total disability was due at least in part to pneumoconiosis. *Id.* at 38. Because the record did not establish the date respondent became disabled, the ALJ awarded benefits as of March 1990, when the claim was filed. *Ibid.*; see 20 C.F.R. 725.503(b).

The BRB affirmed. Pet. App. 26-33. Agreeing that the opinion of respondent's treating physician was well reasoned and documented, the Board sustained the ALJ's conclusion that that opinion outweighed the contrary medical evidence. *Id.* at 31. The Board also sustained the ALJ's finding, in accordance with two out of three medical opinions, that respondent's disability was due at least in part to pneumoconiosis. *Id.* at 32.

3. The court of appeals affirmed. Pet. App. 1-25. Rejecting (*id.* at 7-10) petitioners' argument that respondent's 1990 claim was barred by principles of claim preclusion, the court concluded that respondent

had not sought to relitigate prior claims, but rather to establish entitlement to benefits based on a change in his condition since the earlier denials. *Id.* at 8. The 1990 application for benefits was a different claim from those previously denied, the court reasoned, because it was based on respondent's physical condition at a later time. *Ibid.* Observing that prior decisions under the BLBA had held that pneumoconiosis is a progressive disease, the court declined to entertain petitioners' argument that a claimant who did not go back to work in a mine after a denial of benefits "could never establish a [relevant] change in conditions." *Id.* at 9-10.

As to the appropriate standard for determining whether there had been a material change in condition within the meaning of 20 C.F.R. 725.309(d), the court joined other courts, and the Director of the OWCP, in rejecting the *Spese* standard on which the ALJ and the BRB relied. Pet. App. 10-11. The court agreed that the *Spese* standard violated claim-preclusion principles by permitting a claimant to establish a material change in conditions with evidence showing only that the original decision was incorrect, rather than that the claimant's condition had worsened since the original denial. *Ibid.* The court instead accepted the "one-element" standard articulated by the Director, under which a claimant must establish that he can now prove, using evidence relating to periods after the denial of earlier claims, at least one of the elements of entitlement to benefits that was previously adjudicated against him. *Id.* at 11-19.

The court rejected (Pet. App. 13) petitioners' argument that the Director's interpretation of Section 725.309(d) was not entitled to deference because it

differed from past positions or was a "mere litigating position." The court further held that the Director's interpretation did not impermissibly shift the burden of proof on entitlement to benefits from the claimant to the Director or a responsible coal company. Pet. App. 14-15. In addition, the court held that a "presumption" of material change based on "new evidence of disease or disability" was rational, both because pneumoconiosis is a progressive disease, and because evidence showing the present existence of an element previously held not to exist necessarily demonstrates a material change in conditions, if one assumes that the previous decision was correct when rendered. *Id.* at 16-17. The court agreed (*id.* at 17-18) that it was proper to require a showing of change with respect to only one element of entitlement, because conventional issue-preclusion principles do not accord preclusive effect to a particular finding if an alternative finding made in the same proceeding would have been independently sufficient to support the prior judgment. *Ibid.* Finally, the court rejected petitioners' contention that the Director's standard impermissibly created an "irrebuttable presumption." *Id.* at 18-19. The court of appeals accordingly "adopt[ed] the Director's one-element standard." *Id.* at 19.

The court determined that it could review the award of benefits in this case without remanding for application of the correct threshold test under 20 C.F.R. 725.309(d), because the ALJ's findings that respondent's respiratory status had worsened substantially since the denial of his previous application for benefits, and that the evidence showed total disability and pneumoconiosis, clearly established a material change in conditions under that test. Pet. App. 20-21. On the merits, the court concluded that

the award of benefits was supported by substantial evidence. *Id.* at 21-25.

ARGUMENT

1. Respondent Harvey's counsel has informed the Court that respondent died on October 28, 1997. The case is not moot, however, because the Director of the Office of Workers' Compensation Programs paid the benefits that were due to respondent under the administrative award at issue in this case. See 26 U.S.C. 9501(d)(1)(A); 20 C.F.R. 725.522(b). The Director is a statutory party to this proceeding, 30 U.S.C. 932(k), and he retains a direct monetary interest in having the award affirmed so that he may recoup from petitioners the payments previously made to respondent Harvey. See 30 U.S.C. 934(b); 20 C.F.R. 725.603, 725.608.

2. The court of appeals properly deferred to the Director's interpretation of 20 C.F.R. 725.309(d), under which a claimant may establish the "material change in conditions" that is required to permit consideration of a successive claim for black lung benefits by showing that new evidence (that is, evidence pertaining to the period after the previous denial) now shows the existence of at least one element, necessary to establish an entitlement to benefits, that was finally adjudicated against the claimant in the previous proceedings.[4] Petitioners contend (Pet. 3, 5, 26 n.15) that the Director's approach to successive black lung claims is inconsistent with the BLBA and with general principles of

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[4] The Director's position is incorporated and reflected in some detail in proposed amendments to the relevant regulation. See 62 Fed. Reg. 3395-3396 (Jan. 22, 1997) (proposed § 725.309(d)); see also page 17, *infra*.

claim and issue preclusion, because it permits the "reopening of finally denied * * * cases" and "eliminates finality" in the adjudication of black lung claims. The Court has previously denied review in a case presenting similar questions, see *Lisa Lee Mines* v. *Director, OWCP*, 117 S. Ct. 763 (1997) (No. 96-402), and there is no reason for a different result here.

Petitioners' argument confuses old and new claims for benefits. Under 33 U.S.C. 922 and 20 C.F.R. 725.310, an OWCP district director may reopen and modify a previously denied claim for benefits because of a mistake of fact or a change in conditions, if the claimant requests reopening within one year after the claim is denied. See note 1, *supra*. When a request to reopen is granted, the original claim is readjudicated, and benefits may be awarded from a date long before the previous denial. See *Eifler* v. *OWCP*, 926 F.2d 663, 666 (7th Cir. 1991); 20 C.F.R. 725.503(b).

The regulation at issue in this case, 20 C.F.R. 725.309(d), does not authorize the reopening of a previously denied claim. A subsequent claim that falls outside the one-year reopening period, like respondent Harvey's 1990 claim, is treated as a new claim, and benefits cannot be awarded for any period before the denial of the previously adjudicated claim. Entertaining such a new, but successive, claim does not contravene any finality rule contained in the LHWCA or the BLBA. See *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

Moreover, in order to honor precisely the principles of claim preclusion on which petitioners rely, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), Section 725.309(d) provides that any new claim must

be denied, solely on the basis of the previous denial, unless the claimant can show that there has been a "material change in conditions" since the time of the prior adjudication. See *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997) (en banc); *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1510 (10th Cir. 1996). Preclusion principles do not bar a later claim based on a change in the claimant's condition, because that claim is based on new circumstances (the claimant's physical condition at the time of the later adjudication) and rests on a new allegation that the miner is *now* totally disabled due to pneumoconiosis. See Pet. App. 8; *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 763 (1997); *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995); see generally Restatement (Second) of Judgments § 24 cmt. f (1982); 8 A. Larson & L. Larson, *The Law of Workmen's Compensation* § 79.72(f) (1996) ("res judicata does not apply if the issue is the claimant's physical condition * * * at two entirely different times, particularly in the case of occupational diseases").

The adjudication of successive claims is also consistent with the principle of issue preclusion, which bars relitigation between the same parties of issues that were actually decided in a prior adjudication and were essential to the judgment. See Pet. App. 17; *Peabody Coal Co.*, 117 F.3d at 1008; *Lisa Lee Mines*, 86 F.3d at 1363; see generally *Baker* v. *General Motors Corp.*, 118 S. Ct. 657, 664 n.5 (1998); Restatement (Second) of Judgments § 27 (1982). Because a judgment that a miner does not have pneumoconiosis, or is not totally disabled by the disease, speaks to the miner's physical condition only at one point in time,

it cannot preclude a later judgment based on his condition at a later time. Moreover, where an earlier decision resolves multiple elements of a claim against a miner, but only one finding need be correct in order to sustain the denial of benefits, the factfinder's resolution of the other elements is not, under conventional issue-preclusion principles, conclusive in subsequent proceedings. See *Peabody Coal Co.*, 117 F.3d at 1008 ("holdings in the alternative, either of which would * * * support a result, are not conclusive in subsequent litigation with respect to either issue standing alone," in part because "a claimant who loses on three * * * alternate grounds has no incentive to take an appeal to 'correct' the agency on grounds 2 and 3 even if he thinks there was error, if ground 1 is unassailable"); Pet. App. 17-18; *Lisa Lee Mines*, 86 F.3d at 1363; see also Restatement (Second) of Judgments § 27 cmts. i & o (1982) (factual determination that is sufficient but not necessary to support result will be accorded preclusive effect only if an appellate court has specifically upheld it). Thus, so long as a claimant demonstrates a material change in one element previously resolved against him, he may properly be permitted to relitigate all elements in pursuing a subsequent claim.

Any finality rule that precluded a claimant from filing a claim for benefits on the basis of demonstrably changed conditions would produce perverse results. A miner who misjudged his condition and filed a claim prematurely would be forever barred from an award if the one-year period for reopening his original claim under 20 C.F.R. 725.310 had elapsed before his pneumoconiosis became verifiable or totally disabling. See *Lisa Lee Mines*, 86 F.3d at 1364 & n.14 (rule would place claimants in an "absurd dilemma"); *Sharondale*

Corp., 42 F.3d at 996. The Director's approach to a subsequent claim, by contrast, strikes a reasonable balance between the important interest in finality and the need to permit a miner to file a new claim if his condition worsens to the point at which he meets the statutory criteria for benefits. *Lisa Lee Mines*, 86 F.3d at 1364-1365.[5]

Petitioners take issue with the proposition that pneumoconiosis is progressive. Pet. 7. This Court and others have, however, repeatedly noted the progressive nature of the disease. See, *e.g.*, *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 151-152 (1987); Pet. App. 10; *Wyoming Fuel Co.*, 90 F.3d at 1507; *Lisa Lee Mines*, 86 F.3d at 1364; *Labelle Processing Co.*, 72 F.3d at 314; *Sharondale Corp.*, 42 F.3d at 996. Moreover, the Director, who is principally responsible for the interpretation and administration of the BLBA, has long taken the position that pneumoconiosis (as defined by the BLBA) is a frequently latent disease that may not become manifest until long after exposure ceases, and there is scientific evidence to support that position.[6] See 62 Fed. Reg. 3344 (1997) (restating position and citing studies); Gov't C.A. Br. 42 (same); *Labelle Processing Co.*, 72 F.3d at 314-315. If petitioners wish to suggest modification of the Director's view on the basis of a new "consensus among scientists today" (Pet. 17 n.9), the regulatory revision proceedings presently under-

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[5] The claimant must also file his claim within the limitation period prescribed by 30 U.S.C. 932(f).

[6] Even petitioners concede that "some" persons with pneumoconiosis "could have deteriorating health sufficiently related to black lung disease to warrant another evaluation" after an initial denial of benefits. Pet. 25.

way within the Department of Labor (see page 17, *infra*) would be a more appropriate forum in which to do so than the courts. Cf. *Peabody Coal Co.*, 117 F.3d at 1010 ("[i]n the end, the question [of] whether simple pneumoconiosis can progress in the absence of further exposure to coal dust is a question of legislative fact").[7]

2. Nothing in the Director's one-element test for entertaining new claims impermissibly shifts the burden of proof imposed on a benefits claimant by the Administrative Procedure Act (APA), 5 U.S.C. 556(d), or conflicts with this Court's decisions in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), or *Metropolitan Stevedore Co.* v. *Rambo*, 117 S. Ct. 1953 (1997). See Pet. 24-25. *Greenwich Collieries* invalidated the administrative "true doubt" rule, under which black lung benefits were awarded if the evidence for and against entitlement was evenly balanced, because that rule effectively shifted the ultimate burden of persuasion from the claimant to the party opposing a claim. *Id.* at 281. As the court below recognized (Pet. App. 14-15), however, the Director's "one-element" test for new claims does not alter the burden of persuasion; it simply clarifies what a claimant must show in order to establish a

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[7] We are informed that industry representatives have submitted relevant materials to the Department in the regulatory amendment proceedings, and that those materials are presently under review. We also note that petitioners here failed to incorporate in the record in this case any evidence to substantiate their contention that progression of respondent Harvey's pneumoconiosis was scientifically impossible. Compare *Peabody Coal*, 117 F.3d at 1010 (operator waived argument that simple pneumoconiosis is not progressive by failing to make a proper evidentiary record).

"material change in conditions" within the meaning of 20 C.F.R. 725.309(d). Cf. *Metropolitan Stevedore Co.*, 117 S. Ct. at 1963 n.9 (standard of proof "goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it * * *, but does not determine what facts must be proven as a substantive part of a claim or defense"). A claimant always retains the burden of proof, both on the threshold issue of whether there has been a sufficient change in conditions to justify a new adjudication, and on the ultimate issue of entitlement to benefits once new conditions are taken into account. See, *e.g.*, *Lisa Lee Mines*, 86 F.3d at 1362 (claimant must "*prove* * * * at least one of the elements previously adjudicated against him"); 62 Fed. Reg. at 3395-3396 (proposed § 725.309(d)); Pet. App. 38 (ultimate finding of entitlement in this case).[8]

3. As petitioners point out (Pet. 15-23), there is some disagreement among the courts of appeals

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[8] The one-element test does create a "presumption" of sorts: Once a claimant proves that evidence of his present condition satisfies an element of entitlement to benefits that a previous adjudication found he did not satisfy at an earlier time, it is presumed that his condition has, in fact, changed. See Pet. App. 18; 62 Fed. Reg. at 3352 (preamble), 3396 (proposed § 725.309(d)(3)). This amounts to no more than a presumption that the previous adjudication rested on correct factual determinations—a position fully consonant with the principles of claim and issue preclusion on which petitioners themselves rely. See, *e.g.*, *Lisa Lee Mines*, 86 F.3d at 1363. Moreover, the responsible employer could attempt to rebut the presumption by showing that the previous adjudication was clearly erroneous. Pet. App. 12; see also 62 Fed. Reg. at 3352 (preamble), 3396 (proposed § 725.309(d)(3)). At the very least, there is a "rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal Co.*, 484 U.S. at 159 n.32.

concerning the proper standard for determining whether a miner has established a "material change in conditions" within the meaning of 20 C.F.R. 725.309(d). Any difference in approach under the present regulation does not, however, warrant further review in this case.

The decision below in this case comports with decisions of the Third, Sixth, Fourth and Seventh Circuits, all of which have endorsed the basic contours of the Director's "one-element" test as a reasonable interpretation of current Section 725.309(d). *Peabody Coal Co.*, 117 F.3d at 1009; *Lisa Lee Mines*, 86 F.3d at 1363; *Labelle Processing Co.*, 72 F.3d at 318; *Sharondale Corp.*, 42 F.3d at 997. Indeed, although the Seventh Circuit's decision in *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554 (1991), had been read by some to conflict with the Director's approach (see *Peabody Coal*, 117 F.3d at 1005 (citing cases and noting that "a number of our sister circuits appear to have misunderstood what we require"); see also Pet. 15-16), in *Peabody Coal* a unanimous en banc court made clear its agreement that a "material change in conditions" has been shown so long as "at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial [of benefits] was correct)." 117 F.3d at 1009.

The Tenth Circuit has, however, rejected the one-element test as an interpretation of the present regulation, holding instead that "in order to bring a duplicate claim, a claimant must prove for *each* element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Wyoming Fuel Co.*, 90 F.3d at

1511 (emphasis added). Thus, the Tenth Circuit requires that a comparison of new evidence with that previously presented show a material deterioration in the miner's condition with respect to each previously adjudicated element. *Id.* at 1512. On the other hand, unlike the one-element test, the Tenth Circuit's rule requires only a showing of material deterioration, not a threshhold finding that the new evidence actually establishes the existence of any one element of the new claim. *Id.* at 1511-1512.[9]

The resolution of the present case does not turn on these differences in approach. The ALJ in this case concluded that "[t]he early medical reports are not indicative of total disability due to pneumoconiosis[;] however, the later reports reveal the disease and the latest medical documents present convincing evidence of total respiratory disability * * * with pneumoconiosis being a contributing cause." Pet. App. 37; see also *id.* at 62, 66 (discussing medical reports submitted in connection with prior denied claims). Thus, as to both of the elements that are critical here—the existence of pneumoconiosis and total disability—the ALJ did compare the medical evidence in the new and old proceedings, and he found a material change with respect to each element. There is therefore no reason to suppose that the outcome of this case would have

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[9] The Sixth Circuit has also suggested that some re-examination of prior evidence may be necessary even under the one-element test. *Sharondale Corp.*, 42 F.3d at 999 (ALJ must consider on remand whether x-rays submitted in support of second claim "differ qualitatively" from those submitted in first proceeding). The exact import of that suggestion is not entirely clear.

been any different if the appeal had been taken to the Tenth Circuit.[10]

In any event, there is no reason for this Court to resolve any conflict concerning the interpretation of the present "material change" regulation. As noted above, the Department of Labor has issued proposed regulations that will, if finally adopted, clarify and codify the Director's one-element standard. See 62 Fed. Reg. at 3395-3396 (proposed amended Section 725.309(d)); *id.* at 3351-3352 (preamble explanation). The comment period on the Department's proposed amendments to Section 725.309(d) (which are part of a comprehensive revision of related regulations) has closed, and the Department is in the process of considering the comments received, which include many of the same objections to the one-element standard that are raised in the present petition.[11] Whether or not those objections result in any modification of the one-element test set out in the proposed regulations, the promulgation of final regulations should reduce or eliminate any remaining disagreement among the courts of appeals, and would in any event provide a

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[10] Petitioners contend (Pet. 22) that the Fourth Circuit's decision in *Lisa Lee Mines*, 86 F.3d at 1363-1364, conflicts with other decisions because it refuses to permit a party opposing benefits to rely on the evidence in prior proceedings to rebut the inference raised by the one-element test that there has been a material change in conditions. Petitioners may not rely on any such conflict to seek review in this case, however, because the court below agreed with the Director that any presumption created by his standard is rebuttable. Pet. App. 12, 19.

[11] Those comments include, for example, the American Bar Association resolution on which petitioners rely (see Pet. 3, 24-25).

more appropriate backdrop for any further consideration of the matter by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

WESLEY HARVEY AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF AMICI CURIAE OF THE BARNES & TUCKER COMPANY, BETHENERGY MINES, INC., AND THE PENNSYLVANIA MINES CORPORATION SUBMITTED IN SUPPORT OF THE PETITIONERS

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INTRODUCTION[1]

On four previous occasions this Court has acted to preserve the basic right of coal mine operators to defend themselves in claims under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 (1988) ("the Act" or "BLBA").[2]

Coal mine operators again seek this Court's intervention to dissuade the United States Department of Labor ("DOL") from perpetuating a scheme which eliminates finality in the adjudication of black lung claims as it relates to the three primary elements of entitlement, namely: (i) total disability; (ii) caused by coal workers' pneumoconiosis; and (iii) which arose out of coal mine employment. *Mullins*, 484 U.S. at 141. The DOL avoids administrative finality by interpreting one of its regulations, 20 C.F.R. § 725.309, to create the "one element" test as referred to by the Court below, *Lovilia Coal Company and Old Republic v. Wesley Harvey and Director, OWCP*, 109 F.3d 451 (8th Cir. 1997), a test which was also adopted by the Third Circuit in *Labelle Processing Company v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995), a jurisdiction for black lung claims litigated by Amici.

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[1] In response to Rule 37.6, no counsel for a party authored this Brief, in whole or in part, nor has any monetary contribution been made to its preparation or submission, by any person or entity other than Amici Curiae.

[2] *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 (1987) ("Mullins"); *Pittston Coal Group v. Sebben*, 484 U.S. 105 (1988) ("Pittston Coal Group"); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); and *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991).

Claims litigation procedures are set forth in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) ("LHWCA"); *Greenwich*, 512 U.S. at 271; 33 U.S.C. §§ 919-922, incorporated by reference at 30 U.S.C. § 932(a). The Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988) ("APA") also applies. *Greenwich*, 512 U.S. at 271. 20 C.F.R. § 725.309 is DOL's "duplicate claims" provision which was adopted to permit a re-adjudication of a prior final denial in a multiple filing circumstance only if the new filing met the criteria for modification under § 22 of LHWCA, 33 U.S.C. § 922, or where it is found that " . . . there has been a material change in conditions." 20 C.F.R. § 725.309(c), (d).

The "one element" test is directed at how the adjudicator must assess the issue of material change. For example, a black lung claim fails if the medical evidence does not establish one of the three primary elements as noted above, namely, disease, disability or causation. Under the "one element" test a material change must be found, according to the DOL, if new medical evidence developed after the final denial establishes to the satisfaction of the fact finder any one of the three failed elements. Thereafter, the fact finder, based upon the entire record, including evidence offered in the prior denial, conducts a *de novo* review and makes a determination of entitlement on all three elements. *Labelle*, 72 F.3d at 318.

The "one element" test is clearly wrong since it has nothing to do with determining whether there has been an actual change in a miner's respiratory health as the result of his exposure to respirable coal mine dust. It impermissibly presumes; on the basis of new and possibly just different evidence before the same or a different

fact finder, that claimant can establish one element of a claim; that pneumoconiosis, in the absence of further coal dust exposure, is a latent and progressive disease and that it has, in fact, progressed to the point of disability. These presumptions are unlawful under *Greenwich*. The "one element" test not only eliminates administrative finality but, through its publication, encourages what has become the never ending refiling and relitigation of a black lung benefits claim.

INTEREST OF AMICI[3]

The Barnes & Tucker Company, BethEnergy Mines, Inc. and the Pennsylvania Mines Corporation are all business corporations and now, or in the past, active coal producers. Accordingly, they are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. § 931-945, in two direct ways: (1) as individual coal mine operator defendants,[4] 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF" or "Trust Fund"), 26 U.S.C. § 4121. Revenues

[3] Pursuant to Rule 37.3, written consents of counsel of record for all parties to these proceedings are being filed with the Clerk of this Court with this Brief.

[4] Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(2), 9501(d)(1)(B). The BLDTF also pays all administrative expenses of the Department of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

An additional and very important consideration to the actual payment of benefits to successful claimants are the costs of litigating claims which are not successful. The cost of defending a federal black lung claim through the Administrative Law Judge ("ALJ") stage, both in legal and medical development, on average is nearly $15,000.00. It is surmised that Lovilia Coal and Old Republic, Petitioners herein, incurred such costs in at least three of the five filings by Wesley Harvey as each went to an ALJ for some $45,000.00 in litigation defense costs alone. For claims managed for Amici by this office, 49 percent of these miners have filed for benefits two or more times. Unrestricted repetitive filing, in and of itself, represents significant cost.

Unless this Court grants this Petition, and properly scrutinizes the "one element" test, Amici will face unnecessary expense in the successful defense of these multiple filings, and will also face the chance of unsuccessful defense and the cost of claim payment only because of

the creation of the two unlawful burden shifting presumptions.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the Writ identified in the Petition and, as these are well articulated, their discussion here will be brief. The first is that not all circuit courts that have addressed the issue are in accord. Specifically, although the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Third Circuit in *Labelle, supra*, and the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP*, 86 F.2d 1358 (4th Cir. 1996), *en banc, cert. denied*, 117 S. Ct. 763 (1997), have, for the most part, adopted the DOL's "one element" test, the Tenth Circuit has clearly rejected it in *Wyoming Fuel Company v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996). The Seventh Circuit seems to have agreed with the "one element" test as long as there is a demonstration of an actual material change in that one element. *Peabody Coal Company v. Spese*, 117 F.3d 1001 (7th Cir. 1997).

The second reason advanced in the Petition for granting the Writ is because the "one element" test is so clearly inconsistent with enabling legislation, the APA, and prior decisions of this Court. In *Greenwich*, this Court again confirmed the applicability of the APA to federal black lung claims and held that in black lung litigation the proponent of a fact had the burden of proving it by a preponderance of the evidence. The DOL's "one element" test, without any authority, creates presumptions which

reallocate those burdens, and this reallocation is not permitted under the APA and *Greenwich*.

The "one element" test is further totally inconsistent with the basic principles of *res judicata*, which this Court has held, apply in black lung claims. *Pittston*, 488 U.S. at 122. For example, a black lung claimant could have his claim denied on the basis that, although he had a totally disabling pulmonary impairment, he did not have coal workers' pneumoconiosis, and his impairment was due to smoking cigarettes. Under the "one element" test, on his refiled claim, the claimant could accumulate new x-ray interpretations which would convince the fact finder that coal workers' pneumoconiosis did exist, and that same fact finder would then conduct a *de novo* review of all of the evidence on the issues and could, without restriction, now find as a fact that the claimant's coal workers' pneumoconiosis produced his pulmonary disability, not his cigarette smoking.

Nothing in the modification provisions of the LHWCA contemplates such a result, and the DOL identifies nothing that justifies such a result other than its own analysis of its regulation.

Finally, the Petition discusses the tremendous economic impact the "one element" test has on the mining industry. The absence of administrative finality and the resulting violation of *res judicata* means that there are a significant number of unanticipated and, accordingly, uninsured or unfunded costs. This is further enhanced by its encouragement to unsuccessful claimants to refile their claims. DOL's "one element" test is particularly troublesome to operators similarly situate to Amici. For

the most part, Amici are no longer mining coal or are, in any way, associated with the industry other than for matters such as defending these claims. There is simply no way to fund the cost of refiled claims which are barred by traditional *res judicata* but which are subject to relitigation and possible payment under the "one element" test.

Further, it is clear that the whole basis for the Federal Black Lung Program is, as appropriately anticipated, coming to a close. The Center For Disease Control has recently published data collected by the Examination Processing Branch of the Division of Respiratory Disease Studies, NIOSH, indicating that, over 20 years of the Program, the prevalence of coal workers' pneumoconiosis in miners has fallen from 11 percent to about 3 percent with the more serious types of pneumoconiosis, over a 25 year period, being reduced from 3.5 percent to approximately .5 percent in long term miners, and being nearly eliminated in persons whose coal dust exposure commenced after 1969. The Program has been successful and should end. The "one element" test, arguably, appears as nothing more than DOL's recent attempt to inject new and prolonged life into a Program, which based on the medicine and on the fundamental principles of *res judicata,* should be coming to a close.

As Amici do business within the Commonwealth of Pennsylvania, in addition to being responsible for claims under the BLBA, we must also respond to claims alleging disabling coal workers' pneumoconiosis under the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, Article I, §§ 101-601, as amended, 77 P.S. §§ 1-1066 ("PWCA"). Although the PWCA does not make specific provision for allowing or litigating refiled claims,

such claims are permitted. The way they are dealt with is so distinct from the "one element" test that it further demonstrates how wrong the test is and why this Court must intervene.

In *Robachinski v. Workers' Compensation Appeal Board*, 380 A.2d 952 (Pa. Cmwlth. 1977), the court acknowledged that the refiling of occupational disease claims must be permitted because certain diseases could be progressive in nature, and that the fundamental principles of due process were not violated because what was to be determined was a man's medical condition at a point in time after his prior claim had been denied. There must be proof that the claimant's condition was different than at the time of the denial, and the court clarified that the medical evidence must demonstrate a change in the claimant's condition from the time of the prior denial or, as a matter of law, the claim must be denied. *Kanyan v. Workers' Compensation Appeal Board (Helvetia Coal Co.)*, 557 A.2d 792 (Pa. Cmwlth. 1989), *alloc. denied*, 567 A.2d 655 (Pa. 1990). The court explains:

> [1,2] As both parties note, occupational diseases may be progressive so that the denial of one claim does not necessarily preclude the filing of subsequent claims *Sullivan Trail Manufacturing Co. v. Workmen's Compensation Appeal Board (Wetzel)*, 80 Pa. Commonwealth Ct. 144, 471 A.2d 151 (1984). Additionally, this Court has held that the manifestation of an occupational disease may also be progressive in nature and that claimants should be given the opportunity to introduce medical evidence sufficient to demonstrate whether said manifestations are progressive. *Fields v. Workmen's Compensation Appeal*

> *Board (Duquesne Light Co.)*, 114 Pa. Commonwealth Ct. 645, 539 A.2d 507 (1988), *appeal denied*, 520 Pa. 599, 552 A.2d 253 (1988). The Board here remanded to the referee to allow Claimant to prove his change in condition or manifestation of illness. Yet, Claimant's third petition substantively relied upon the same medical diagnosis given by Klemens in Claimant's prior claims. When asked if his diagnosis had changed or if Claimant's manifestation of pneumoconiosis had worsened since the previous claims, Klemens replied in the negative several times. Upon reversal and remand, the Board specifically ordered that the referee determine if there had been a change in Claimant's manifestation of pneumoconiosis that would establish Claimant's third petition as a new claim rather than a relitigation of his prior claims. *See Robachinski.* (footnotes omitted).
>
> In the instant case, the referee's finding of Claimant's partial disability was based on Klemens' medical evidence which was substantively similar to x-rays and diagnosis he had previously given and which had been denied as insufficient by two prior referees. This Court has held that such repetitive evidence is insufficient to support a referee's findings of disability. In *Sullivan*, the Court stated that if a claimant's only evidence for a second claim is based upon the medical evidence adduced at a hearing on a first claim petition which resulted in a finding of no disability, then such evidence is insufficient.

Kanyan, 557 A.2d at 794.

Amici submit that such an analysis is what "material change" is all about. Such an approach is in accord with

res judicata, administrative finality, and is accomplished without improper burden shifting presumptions.

It is noted that Pennsylvania has a further restriction in support of finality whereby the PWCA requires, in Section 301(c)(2), that disability occur within 300 weeks of the date of last exposed employment. 77 P.S. § 411. The BLBA contains no comparable provision which makes it even more important that the fundamental principles of *res judicata* be maintained. Accordingly, it is all the more important that this Court properly scrutinize the "one element" test.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

WESLEY HARVEY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF BITUMINOUS CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed in support of the petition for writ of certiorari.[1] The Association of Bituminous Contractors, Inc. ("ABC") is a multiemployer association of independent and general contractors who perform various types of construction work for coal company customers. ABC's member companies engage in shaft and slope

[1] Pursuant to Supreme Court Rule 37.2, this brief is filed with the written consents of the parties which are filed concurrently herewith.

construction, the construction of structures such as preparation plants, road construction and electrical work at both existing and future coal mine sites.

The Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945, employs certain definitions as terms of art to identify the class of individuals potentially eligible for black lung benefits. Construction workers do not engage in the usual tasks associated with the mining of coal, that is the extraction and preparation of coal for commercial use. However, for purposes of the Act, the definition of "miner" encompasses construction workers to the extent that they are exposed to coal dust as a consequence of their work in coal mine construction. 30 U.S.C. § 902(b). Defined as "miners" under these circumstances, employees of ABC member companies are entitled to black lung benefits if they become totally disabled due to pneumoconiosis. Survivors of such employees whose death was due to pneumoconiosis are also entitled to benefits.

Where an award is made, benefits for a claim are paid either by a "responsible operator" within the meaning of the Act and the implementing regulations, or, in the absence of a responsible operator, by the Black Lung Disability Trust Fund. 20 C.F.R. §§ 725.492, 725.493. The regulations provide that only one operator is responsible for the payment of a particular employee's benefits. If an employee had multiple employers, liability is assessed against the most recent employer for whom the employee worked at least one year as a "miner." 20 C.F.R. § 725.493(a) (1).

Since the passage of the 1978 amendments to the Act, ABC's member companies have been named as potentially liable "responsible operators" in cases filed by approximately 500 claimants. The resolution of the issues presented in the petition concerning the legal standards which should be applied in the adjudication of duplicate claim filings will have an impact on both pending and new duplicate claim filings by any of these 500 claimants. Moreover, the impact will extend beyond this group if ABC members are newly named as

potentially liable parties in duplicate claim filings by heretofore unknown claimants. The identity of such claimants cannot be ascertained, but ABC believes their number may be significant given the Department's policies for determining potentially liable responsible operators under its most-recent-year-of-employment regulation.

ABC's members are geographically dispersed, engaging in construction projects at locations throughout the United States. Currently, diverse standards are applied in the adjudication of duplicate black lung claims in the various judicial circuits. ABC supports the petitioner in urging the Court to establish uniform standards to be applied in adjudicating duplicate claims.

SUMMARY OF ARGUMENT

Awards should be made on duplicate federal black lung claims only where a previously denied claimant can make a meaningful showing of a deterioration in health attributable to pneumoconiosis, that is a "material change in condition." Allowing readjudication of duplicate claims is an exception to the usual rule of judicial finality, and one which must be construed to limit the availability of new evaluations of previously denied claims. The Department of Labor has improperly taken the position that something less than a meaningful showing of deterioration in health is sufficient to overcome the bar of finality. The Department's position rests on the theory that pneumoconiosis can be presumed to progress in all cases, thereby allowing a finding of "material change" without affirmative proof of an actual worsening of health due to black lung disease.

As applied to construction contractors, the Labor Department's theory of progressivity is wholly specious. The provisions under which a construction contractor can be held liable are supposed to limit awards to cases involving dust exposure comparable to that experienced by actual coal miners. Because of the way the determination of dust exposure is made, however, it is possible for a construction

worker with no dust exposure to maintain a claim. The net result is that a claimant can avail himself of the presumption of progressivity in duplicate claims even where there may have been no dust exposure before, during, or after his employment. Even if such an individual is highly unlikely to prevail on the merits of his claim, the absence of finality forces the named "responsible operator" to defend claims which should never be allowed to go forward.

Because the Department's liberal reopening policy leads to full adjudication of duplicate claims filed many years after employment ceased, it effectively undermines the right of construction companies to contest the Department's responsible operator designation. In order to mount an effective defense, a construction contractor must produce highly specific evidence of the actual day-to-day dust conditions encountered by a claimant. Such evidence becomes increasingly more difficult to muster with each passing year. Requiring a construction contractor to develop its evidence in the first instance in connection with a duplicate claim filed long after employment ceased improperly ignores the parties' reasonable expectation of finality.

ARGUMENT

I. The irrationality of the Department of Labor's theory of "material change" is starkly presented in the case of construction workers who are not exposed to the conditions giving rise to black lung disease.

The Department's regulations impose a threshold requirement for adjudication of so-called duplicate claims, requiring that they be denied on the basis of the previous denial of a claim unless a "material change in conditions" can be shown. 20 C.F.R. § 725.309(c), (d). This is an exception to the general rule that final adjudications should not be reconsidered, and reflects the Department's judgment that a new evaluation of a previously denied black lung claim should be permissible in certain cases. Necessarily, the class

of cases which are subject to this exceptional treatment should be limited. Federal black lung claims are subject to the usual constraints of res judicata, and previously denied black lung claims should be reopened and reevaluated only in those instances where the claimant in question can affirmatively demonstrate a deterioration in health due to black lung disease.

As described by petitioner, the Department of Labor has improperly developed a burden-shifting scheme unsupported by legal authority or valid medical science that allows unsuccessful claimants to pursue awards without having to make a meaningful showing in connection with a duplicate claim. To justify this result, the Labor Department relies on the dogma that pneumoconiosis is a progressive disease even in the absence of dust exposure. This leaves the way clear for an endless series of reopenings, which is totally at odds with applicable principles of finality.

The relevant legal context and the current state of the law are fully presented in the petition and demonstrate why the Labor Department's theory is an unacceptable way to approach duplicate claims adjudication. The application of this theory leads to especially irrational results in the cases of many construction workers where there is no evidence that they were ever exposed to coal mine dust in the first place.

Coal mine construction work frequently involves limited, or no, dust exposure. Workers who may be erecting new structures or otherwise preparing a site for future coal mining operations simply do not encounter the type of conditions giving rise to black lung disease that were the genesis of the federal black lung program. Congress accordingly included provisions in the Act to address these special circumstances. As explained in the report of the Senate Committee on Human Resources:

> The term [miner] includes coal mine construction workers when they work in conditions *substantially similar to conditions in underground coal mines.*

S. Rep. No. 95-209, 95th Cong. 1st Sess. 20 (May 16, 1977) (reprinted in the Legislative History of the Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 p. 624) (emphasis added).

It is for this reason that Congress limited the circumstances under which construction companies may be held liable under the Act. Only to the extent a construction worker is employed under conditions which may cause black lung disease, that is, to the extent he or she is exposed to coal dust, is a construction worker a "miner" for purposes of the Black Lung Act. 30 U.S.C. § 902(b); 20 C.F.R. § 725.491(c) (1) (construction contractors may be held liable for the payment of benefits only with respect to their employees "who work or have worked . . . in coal mine construction in any period during which such employees were exposed to coal dust during their employment with such contractor").

Despite the express concern of Congress with viewing construction workers as miners only to the extent they are exposed to conditions like those found in underground mining, the Department's implementing regulations approach the issue from a different perspective.[2] For purposes of determining whether a worker was exposed to coal dust, the Department employs a burden-shifting presumption that requires a construction contractor to *disprove* the existence of conditions which are similar to those found in mining. Specifically, there is a rebuttable presumption that an individual was regularly and continuously exposed to coal dust during the course of employment by the construction contractor. 20 C.F.R. § 725.492(c). The regulations specify that this presumption may be rebutted by showing that the employee was not regularly exposed to coal mine dust during his or her employment in or

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[2] In responding to comments concerning the proposed regulations, the Department took the position that statutory authority does not limit the coverage of construction employees only to situations in which there is exposure to dust conditions substantially similar to those encountered in underground mining. 43 Fed. Reg. 36,778 (1978).

around a coal mine or preparation facility. 20 C.F.R. § 725.202(a)(1).

Under this burden-shifting approach, there need be no affirmative proof whatsoever that a construction worker was exposed to dust conditions comparable to coal mining in order for the worker to be considered a "miner" potentially eligible for black lung benefits. Rather, the determination rests on the sufficiency of the employer's evidence to refute the existence of regular exposure to coal mine dust. Furthermore, in applying the regulations, the Department has taken the extreme position that rebuttal must be denied absent evidence addressing each and every moment the claimant was employed. *See Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990) (evidence concerning generally clean conditions legally insufficient to meet the employer's burden of proof). Once the dust exposure issue is thus reduced to an evidentiary question heavily skewed against a negative finding, the resolution of the issue may, but will likely not, reflect on the actual dust conditions under which the worker was employed.

As a result, there is no reason to presume in any construction worker case that the claimant was exposed to dust conditions which would support, or even suggest the possibility of, a potential future impact on his health. Many cases simply rest on the contractor's inability to muster the quantum of proof necessary to disprove exposure. Therefore, given this setting, to throw open the case for full readjudication based on anything less than an affirmative showing by the claimant of a material change in condition is completely unfounded and irrational.

II. Because of the special circumstances under which construction companies can be held liable as "responsible operators" under the Act, they are at a particular disadvantage when forced to defend previously denied claims long after employment with the company ceased.

Oftentimes a determination of responsible operator status is not made when a claim is denied on medical grounds because where no award is made, there is no need to decide who should pay. In this setting, lack of finality is particularly prejudicial to construction contractors who, because of the passage of time, may not be able to locate and develop evidence needed to refute their operator status when the claim is readjudicated as a duplicate claim many years later.

Delayed adjudication potentially affects all named "operators" who must defend themselves long after the claims process was initially commenced. In the case of construction companies, however, the absence of finality has particularly adverse consequences because of the special circumstances which apply to the determination of their "responsible operator" status. As a practical matter, the disregard for finality in adjudications prevents construction companies from presenting the fundamental defense Congress provided, namely that the individual was not a "miner" while employed by the construction company.

While the most-recent-year-of-employment rule of liability would tend to suggest that the "responsible operator" determination is being made as close as possible in time to the cessation of employment, this is frequently not so where construction employment is involved. Because of the transitory nature of construction jobs, many construction workers are employed on-and-off by numerous employers during their lifetimes. To be named as the "responsible operator," a construction company need only have employed an individual for one year (either at one time or for cumulative periods adding up to a year) at some point during his lifetime. Depending on the individual's work history, the

named construction company might have last employed the individual many years before he ceased working for good. This situation arises when none of the employee's more recent employers meet the one-year requirement, a common occurrence in construction employment.

In light of the burden imposed on construction companies to *disprove* dust exposure, they are at a particular disadvantage when claims are not adjudicated within a reasonable period after the cessation of employment. Ten, fifteen or twenty years after a worker left the employment of a construction company it may be impossible for relevant evidence to be developed on the dust exposure issue. Even if there was *no* dust exposure, the passage of time alone may prevent rebuttal of the presumption of exposure because witnesses or documents are no longer available.[3] The consequence of this delay is that a construction company who should not be liable cannot overcome the Department of Labor's designation as a potentially liable party.

It may seem that the problems of proof associated with delayed adjudications of the responsible operator issue are generally present in all black lung claims and are not associated with construction worker claims in particular. The difference is that there may be historical employment information created for other purposes that will resolve a mining company's status, but there is no such information to resolve a construction company's status. Where the fact and length of employment are the basic issues, it is often possible to rely on Social Security Administration earnings records or other usual business records to establish the necessary employment history, even years later. Since employment only is the basis for responsible operator designation in the usual

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[3] The petitioner, for example, presents a case where the first black lung claim was filed in 1973, the fifth claim was filed in 1990, and no award was made until 1993. In a similar situation involving a construction company, the employer would have to present evidence on the extent of dust exposure in the first instance approximately twenty years after employment ceased.

mining company setting, later adjudications do not present insurmountable hurdles, at least in theory.[4]

By contrast, there will seldom be business records or historical documents, created for other purposes, that address the dust exposure issue. When presented with an award in the first instance years after a denial, the construction employer faces the prospect of finding documentation of the projects at which the claimant was employed (which probably were concluded at the same time or shortly after the claimant ceased working); witnesses who are familiar with those projects (usually employees who were employed at the same time and place as the claimant); and recreating the setting of the claimant's employment. Doing this for construction projects which ended years before will be possible in only the rarest of cases. The failure to give force and effect to the normal concepts of finality which should be applied in federal black lung cases thus has the unanticipated and unjustifiable consequence of holding construction contractors liable in cases where they should not be.

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[4] Under the regulations, an individual employed by a coal mine operator is considered to be a miner regardless of the dust conditions encountered in his or her work. 20 C.F.R. § 725.202(a).

CONCLUSION

For the reasons stated above, ABC urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

WESLEY HARVEY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., NATIONAL WORKERS COMPENSATION REINSURANCE POOL AND ALLIANCE OF AMERICAN INSURERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Principles of finality are crucial to ensuring that the American legal system serves as a disciplined process to fairly adjudicate rights and determine facts. Notwithstanding this Court's clear instruction that there is no basis to override the doctrine of res judicata in the absence of a Congressional mandate, principles of finality are rarely recognized and protected in federal black lung cases. The Third, Fourth, Sixth and Eighth Circuits eschew these principles by condoning a perpetual right to have claims readjudicated. The Seventh and Tenth Circuits permit the reopening of a claim under more limited circumstances that accord some preclusive effect to the prior adjudication. The disagreement among the circuits creates grave uncertainty in this area of the law and the refusal of the circuits to honor ordinary principles of finality in federal black lung cases imposes upon Amicis' members not only serious procedural unfairness, but also unreasonable and unexpected financial liability.

The National Mining Association ("NMA") is a trade association representing coal mine operators who produce sixty percent of the nation's coal. NMA's membership includes coal mining companies of all sizes, as well as other key segments of the industry, such as coal brokers, equipment suppliers, coal transporters, and electric utilities. Coal producers are responsible for the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, as individual coal mine operator defendants, 30 U.S.C. §§ 932-933, and as mandatory

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[1] Pursuant to Rule 37.2, written consents to this brief's filing from counsel of record for all parties to these proceedings are being filed with the Clerk of the Court with this brief. Counsel for Amici has consulted with counsel for Petitioners in the preparation of this brief. Other than Amici and their members, no person or entity made a monetary contribution to the preparation or submission of the brief.

payors of an excise tax on coal production paid into the Black Lung Disability Trust Fund ("Trust Fund"), 26 U.S.C. § 4121. NMA and its members are committed to preserving a viable and just black lung compensation system.

The National Workers Compensation Reinsurance Pool ("NWCRP") is a contractual reinsurance pooling mechanism among participating workers' compensation insurers. The NWCRP affords such insurers an option for complying with state insurance plan requirements by sharing in the operating results arising out of certain policies written pursuant to such insurance plans.

The National Council on Compensation Insurance, Inc. ("NCCI") is the nation's largest workers' compensation and health care information corporation. As Administrator of the NWCRP, under the direction of the NWCRP Board of Governors, NCCI is responsible for the Pool's financial operations as well as the rules and procedures that govern those transactions.

The Alliance of American Insurers ("AAI") is a national trade association representing approximately 260 property and casualty insurers. Alliance member companies write over twenty percent of the workers' compensation insurance provided by private insurers under state workers' compensation programs.

The American Insurance Association ("AIA") is a national trade association of more than 300 property and casualty insurance companies that write a substantial share of workers' compensation insurance throughout the nation, including coverage under the Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act. Members provide black lung coverage through the voluntary market and residual markets, the latter of which is reinsured through the NWCRP,

administered by NCCI. AIA has a longstanding interest in and support for the workers' compensation system and is dedicated to ensuring that workers' compensation programs provide a fair level of income support and necessary medical care for injured workers at an affordable price for employers.

Amicis' members are all part of the intricate financial mechanism that has ensured the payment of billions of dollars to claimants since 1972 through insurance and self-insurance mechanisms and in payments by the Trust Fund. Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and commercial insurance arrangements involve careful advance financial planning. This planning necessitates the capability to predict with accuracy the frequency of claims within a given year and the likelihood of their approval. The circuits' abandonment of ordinary principles of finality deprives Amicis' members of the capability to assume a correct approval rate, and thereby prevents them from setting a sufficient charge, or setting aside enough money, to pay claims. Since 1973, the workers' compensation insurance industry has guaranteed the availability of workers' compensation insurance covering federal claims to all mine operators doing business in states that permit the sale of commercial workers' compensation insurance coverage. The questions presented in the Petition as to the finality accorded prior black lung claim adjudications pose enormous economic consequences for Amicis' members.

ARGUMENT

I. REVIEW IS WARRANTED TO CLARIFY THE APPROPRIATE STANDARD FOR APPLYING THE PRINCIPLES OF FINALITY IN BLACK LUNG CLAIM ADJUDICATIONS

A. The Disagreement Among the Circuits Creates Grave Uncertainty for Everyone Involved in the Black Lung Program

This Court has stressed repeatedly that the ordinary principles of finality embodied in the doctrine of res judicata are rules of "fundamental and substantial justice" which must be enforced by the courts. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Notwithstanding this well-established principle, the circuits have struggled with the notion of when, if ever, there is an end to a black lung claim adjudication.

The Department of Labor's regulations allow a miner whose prior claim for black lung benefits has been denied to file a subsequent, or "duplicate," claim and receive benefits if it is determined that "there has been a material change in conditions" since the prior adjudication denying the claim. 20 C.F.R. § 725.309(d) (1997). Because "[t]he regulations fail to define what a miner must prove to demonstrate such a material change," *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1508 (10th Cir. 1996), the courts have been left to "determine the proper standard by which to measure the existence of a 'material change.'" *Sharondale Corp. v. Ross*, 42 F.3d 993, 997 (6th Cir. 1994). Predictably, the resulting disparity in standards has created untoward uncertainty about when a black lung claim is considered final and settled among the parties.

The Petition (at 15-23) fully explicates the substantial disagreement among the circuits as to the proper application of the salutory principle of res judicata in black lung claim adjudications. It suffices to note here that the decision below, Pet. App. at 11, 12, 19, as well as those of the Third, Fourth and Sixth Circuits, countenance the perpetual reopening of denied claims by allowing additional evidence and reweighing of old evidence to support a duplicate claim. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318 (3d Cir. 1995); *Lisa Lee Mines v. Director, OWCP*, 86 F.2d 1358, 1362-63 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997); *Sharondale Corp.*, 42 F.3d at 998.[2] The Seventh and Tenth Circuits draw upon more traditional notions of finality and claim preclusion by requiring no less than direct proof of a material change in condition, *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 556 (7th Cir. 1991), or proof of each element of entitlement, *Wyoming Fuel Co.*, 90 F.3d at 1510-11, to support a duplicate claim.

The preclusive effect accorded a prior benefit adjudication should not turn simply upon the geographical location of the mine where the claimant was last employed. However, that is precisely the effect of the disparate approaches among the circuits in their readjudication of federal black lung claims. The Court should grant review to eliminate this untoward uncertainty.

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[2] The decision below explains that the so-called "one-element" standard adopted by these circuits compels an inference that a material change has occurred if new evidence establishes at least one of the elements of entitlement ***previously adjudicated against the miner***. Pet. App. at 11, 12. This inference then requires a reweighing of all the evidence — including the evidence predating the prior denial — to determine whether it supports an entitlement to benefits. *Id.* at 12.

B. The Decision Below Conflicts Directly With Controlling Precedent

The rigorous adherence to the doctrine of res judicata is a well-established part of this Court's case law. *Federated Dep't Stores, Inc.*, 452 U.S. at 400. In *Pittston Coal Group v. Sebben*, this Court found no reason to temper the rule for black lung claim adjudications. 488 U.S. 105, 122 (1988). In its countenance of repeated readjudications of a claim, the decision below seriously undermines what this Court established in *Pittston*, and flatly conflicts with this Court's consistent instruction that no principle of law or equity sanction the displacement of this fundamental doctrine. *See Federated Dep't Stores, Inc.*, 452 U.S. at 401; *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

Here, the Eighth Circuit side-stepped the doctrine of res judicata by characterizing the claimant's repeated attempts to relitigate the previous denials as a "new" claim to benefits based on a change in conditions. Pet. App. at 8, 9, *See also Lisa Lee Mines*, 86 F.3d at 1362 (nothing bars claimants from refiling claims seriatim because the claims are not the same); *Labelle Processing Co.*, 72 F.3d at 314 (claimant may refile a duplicate claim asserting entitlement because of changes subsequent to the prior adjudication). But this deceptively simple characterization of duplicate claims does not fully disclose how the "one-element" standard actually works.

First of all, the "one-element" standard does not demand that the claimant actually show a material change in his condition or, for that matter, any change at all. Rather, the claimant need only adduce new evidence to "establish[ ] at least one of the three elements of entitlement previously adjudicated against [him]." Pet. App. at 11. *Accord Lisa Lee Mines*, 86 F.3d at 1362. And, once the claimant establishes one element

of entitlement with new evidence, the claim is reopened to reevaluate whether all the evidence — including old evidence — establishes the remaining elements of entitlement. Pet. App. at 12, 18.

If, as the adherents to the "one-element" standard assert, the reopening of a prior benefit adjudication through a duplicate claim is truly a new claim, rather than an attempt to relitigate earlier claims, one would expect the standard to demand, at a minimum, direct proof that a material change in condition has actually occurred since the denial of the earlier claim. But the standard makes no such demand. Instead, it *presumes* a change on the basis of any additional evidence of a claimant's condition subsequent to the earlier denial that shows merely one of the elements of entitlement. Thus, a claimant may reopen prior adjudications repeatedly through duplicate claims and receive benefits, "notwithstanding that his condition has not changed at all," *Lisa Lee Mines*, 86 F.3d at 1366 (Niemeyer, J., dissenting), simply because additional evidence "might show merely that the original denial was wrong." *Sahara Coal Co.*, 946 F.2d at 566. Such a result not only offends, but eviscerates the core principles of res judicata.

The standard adopted below improperly invites perpetual refilings and readjudications of a claim until the claimant "finally gets it right," *Pittston Coal Group*, 488 U.S. at 122, by finding a judge who disagrees with the prior determination as to the strength of the evidence. The only bar would be a claimant's lack of persistence. This Court has already instructed that "[t]his is not the way the law works." *Id.* To indulge the contrary view, as did the court below, would result in the very mischief — confusion and uncertainty — which is "the very purpose of the doctrine of res judicata to avert." *Reed v. Allen*, 286 U.S. 191, 201 (1932). This manifest disregard of established principles warrants review.

II THE QUESTIONS PRESENTED IN THE PETITION HAVE SUBSTANTIAL IMPLICATIONS FOR THE BLACK LUNG BENEFITS PROGRAM

A. The Departure From Ordinary Principles of Finality Imposes Unfair Burdens Upon Coal Operators and Their Insurers

The principles of finality normally accorded prior adjudications ensure that everyone knows when a claim is considered final and settled among the parties. The departure from these principles, here, as well as in the circuits where most claims arise, imposes a unique unfair burden on coal operators and their insurers. Most refilers last worked in the mines many years ago. Such refilers' benefits and claim costs were self-insured by coal companies or insured under old insuring agreements. The cost of those agreements was based upon expectations that the ordinary rules of finality would apply. Such agreements are not funded for the repeated costs of relitigation.[3] Nor are such agreements funded for extra awards made to persistent refilers. The effective waiver of res judicata and claim preclusion in black lung claims imposes substantial costs on self-insured coal operators and coal operator insurers — costs that were not anticipated and cannot be recovered.

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[3] A recent survey by actuaries of total average industry defense costs showed that the average total defense cost per actively defended claim through the Benefits Review Board level was $6,069. Milliman & Robertson, Inc., *Cost Analysis of Federal Black Lung Act Regulations Proposed on January 22, 1997*, fig. 8, at 24 (Aug. 21, 1997) [hereinafter M&R, Inc., *Cost Analysis*] (app. 5 to Comments of the National Mining Association, American Insurance Association, National Council on Compensation Insurance, National Workers Compensation Reinsurance Pool, Alliance of American Insurers, and American Iron and Steel Institute, filed with United States Department of Labor's Employment Standards Administration in response to Notice of Proposed Rulemaking, 62 Fed. Reg. 3338 (1997) and available as part of the Public Docket in that proceeding).

The invitation extended here to perpetually refile claims previously adjudicated is also unfair to claimants in that it creates an unreasonable expectation of ultimate award of benefits. Such expectations encourage claimants who may truly not be entitled to benefits to persist in refiling claims under the mistaken belief that the claim will ultimately be granted. Some may be granted through the sheer weight of the legal process. This will be unfair to defendants. However, many claims will be denied repeatedly. To encourage such unrealistic persistence in claimants, who are often elderly, is unfair and wrong.

B. The Perpetual Reopening of Claims Sanctioned By the Decision Below Will Cause Serious Economic Hardship For the Black Lung Program

The decision below not only creates legal uncertainty, it has the potential to generate serious economic disruption for the Black Lung Benefits Program. In the last 15 years, 67,419 new claims and 42,556 duplicate claims have been filed under the Black Lung Program.[4] Thus, almost 40% of this pending claim activity is comprised of refilings by miners who have already received at least one prior adjudication denying their claim.

A refiler from this substantial pool of duplicate claims would likely avoid the application of the ordinary rules of finality, particularly, if the refiling is subject to the reopening standards

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[4] Div. of Coal Mine Workers' Compensation, U.S. Dep't of Labor, MIS Report No. 11, *Primary Work Load for District Office: All Offices*, p.7 of 10 (Sept. 30, 1997) [hereinafter DOL MIS Report No. 11]. The Department apparently treats each refiling as a single event. Since there have been claimants with multiple refilings, such as Mr. Harvey, the Department's cumulative refiling number is larger than the actual number of people who have refiled.

adopted by the Third, Fourth, Sixth and Eighth Circuits. There is strong reason to believe those circuits' jurisprudence will control most of the refilings.[5]

The potential additional costs imposed by the exception to res judicata the circuits have carved-out for black lung claim adjudications is enormous. The projected lifetime cost of duplicate claims awarded or paid out since 1982 alone exceeds $1 billion.[6] This cost would double if only a few thousand more of the pending pool of refilers are awarded benefits under the circuits' qualification of the ordinary principles of finality. This enormous and unanticipated economic burden will not only fall directly upon coal operators and their insurers, but also upon the Trust Fund whose deficit now exceeds $5 billion. Employment Standards Admin., U.S. Dep't of Labor, *OWCP Annual Report to Congress FY 1996*, at 23 (1997).

This Court has long recognized that "'simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied." *Federated Dep't Stores, Inc.*, 452 U.S. at 401. The Court should review the Eighth Circuit's

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[5] *Shupe v. Director, OWCP*, 12 B.L.R. (MB) 1-200, 1-202 (Ben. Rev. Bd. 1989) (Board applies the law of the circuit in which the miner most recently performed coal mine employment). The Third, Fourth, Sixth and Eighth Circuits include the states historically with the most underground coal mines. More than 80% of the nation's underground coal production over the past 50 years has been mined in the states within these circuits.

[6] The projection is constructed information from the Department of Labor and industry actuaries. The Department reports that 2475 post-1982 refiled claims have been awarded benefits and are presently being paid. Another 1923 post-1982 refiled claims were awarded benefits but have since been retired. DOL MIS Report No. 11, p. 10 of 10. Thus, the total number of post-1982 refiled awards is 4398. The average lifetime payout of federal black lung benefits for a miner and dependants awarded to a 60 year old miner is $263,275. M&R, Inc. *Cost Analysis*, fig. 7, at 23. Therefore, the projected lifetime payout of historic post-1982 refiled awards is $1,157,883,450. All these costs are undiscounted.

rejection of the principles of res judicata to restore the evenhanded application of the black lung law and to prevent the serious economic injuries that — absent review — the disregard of these salutory principles will inflict upon the coal industry, their insurers and the Trust Fund.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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